Missouri Law Review

Volume 5
Issue 4 *November 1940*

Article 1

1940

Work of the Missouri Supreme Court for the Year 1939 - Statistical Survey

Missouri Law Review

Volume 5 NOVEMBER, 1940 Number 4

THE WORK OF THE MISSOURI SUPREME COURT FOR THE YEAR 1939

STATISTICAL SURVEY

EDWARD E. MANSUR*

The activity of the court, as indicated by the number of cases disposed of by opinion, remains relatively constant. In 1935 the number was 331; in 1936 it was 369; in 1937 it was 277; in 1938 it was 303; and in 1939 it was 290.

Table I indicates the disposition of this litigation by the court.

TABLE I

Judgment affirmed	114
Affirmed on condition (enter remittitur)	4
Decree affirmed	1
Awarding of new trial by trial court affirmed	5
Awarding of new trial by trial court affirmed and remanded	1
Reversed and remanded	56
Judgment reversed	28
Affirmed in part and reversed in part	1
Affirmed in part and reversed and remanded in part	2
Awarding of new trial by trial court reversed	7
Awarding of new trial by trial court reversed as to one defendant, affirmed as to other	1
Reversed with directions to resentence petitioner	1
Judgment of submission set aside and case remanded	1
Writ quashed	10
Writ denied	2
Writ dismissed	1
Peremptory writ issued	2
Provisional rule discharged and permanent writ denied	1

*Chairman, Board of Student Editors.

Provisional rule absolute	4
Provisional rule discharged	2
Preliminary rule absolute	4
Preliminary rule discharged in part, made absolute in part	1
Case transferred to court of appeals	18
Record quashed	1
Appeal dismissed	3
Petitioner discharged	1
Petitioner remanded to custody	1
Opinion quashed	2
Record and opinion quashed	3
Record and opinion quashed in part	3
Judgment of court of appeals quashed	1
Opinion and order quashed in part	3
Motion to dismiss overruled	1
Ouster denied and proceeding dismissed	1
Respondent ousted from office	1
Respondent discharged	1

Table II shows the relative appellate activity in the several fields of the law. A word of warning must be given, however. Each case was, in some instances almost arbitrarily, allocated to the single subject with which it seemed primarily to be concerned. It is seldom, of course, that a case is disposed of on a single point, and if all the cases which touched upon each field were listed under these headings, it is possible a somewhat different relationship might be shown. Certainly few cases are presented to the court in which questions of practice and jurisdiction are not involved. It should be noticed, too, that the table is concerned only with the activity of the supreme court. No attempt is made to show the relative activity in the several fields of law in the trial courts.

TABLE II

TOPICAL ANALYSIS OF DECISIONS

Agency	1
Appeal and Error	22
Attorney and Client	5
Banks and Banking	6
Bills and Notes	1
Certiorari Proceedings	6
Conflicts	1
Constitutional Law	8
Contempt	1
Contracts	7
Corporations	2
Creditors Rights	1
Criminal Law	49
Damages	2
Domestic Relations	4

Election Contest	1
Eminent Domain	6
Equity	8
Evidence	2
Habeas Corpus	2
Insurance	12
Mandamus	2
Master and Servant	10
Negligence (automobiles)	13
Other Negligence	14
Ouster	1
Partnership	1
Pleading	8
Practice and Procedure	15
Prohibition	2
Quo Warranto	2
Real Property	13
Receivership	2
Statutory Construction	11
Taxation	8
Torts (other than negligence)	5
Trusts	6
Wills and Administration	11
Workmen's Compensation	10

It is interesting to observe that no case was reversed upon rehearing. In only four cases were dissents recorded, although in six additional cases a concurrence only in the result was indicated by some judges.

There were seven *per curiam* opinions; 121 opinions were written by judges; 162 opinions were written by the commissioners. There were two changes in court personnel. Judge Albert Clark succeeded Judge Ray Lucas at the beginning of the year, and Commissioner S. P. Dalton was appointed to the place left vacant by the death of Commissioner Charles Ferguson in April.

APPELLATE PRACTICE

CHARLES V. GARNETT*

The decisions of the court in the past year, insofar as they deal with questions of appellate practice, have shown no tendency on the part of the court to a technical application of its rules which would result in the

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*Attorney, Kansas City. LL.B., Kansas City School of Law, 1912.

impairment of substantial rights of litigants. In general, the principles which have governed prior decisions of the court have not been disturbed. The tendency has been, as in former years, toward liberalization and common sense application of the fundamental rules governing the jurisdiction of the court and its procedure.

I. Jurisdiction of the Supreme Court

In *Robinson v. Nick*,[1] the court again emphasized the constitutional source of its jurisdiction, refusing to look upon Section 1018, Missouri Revised Statutes 1929, which provides that the supreme court shall summarily hear and determine all appeals from interlocutory orders appointing receivers, as in any sense broadening its jurisdiction. In that case the court transferred an appeal from an order refusing to revoke the appointment of a temporary receiver to the proper court of appeals, pointing out that:

> "Our appellate jurisdiction is fixed by the Constitution. Therefore, the Legislature is powerless to add to or subtract from that jurisdiction unless authorized by the Constitution itself. The only field of change allowed to the Legislature by the Constitution is the pecuniary amount in dispute . . . Therefore, if Section 1018 attempts to confine exclusive jurisdiction in this court of an appeal from an order refusing to revoke the appointment of a receiver, it is . . . contrary to and in conflict with Section 12, Article VI of the Constitution."

In *McCoy v. Simpson*,[2] the court held that an appeal from an order of the circuit court affirming the award of the Workmen's Compensation Commission which merely read "Award of Commissioners Affirmed," conferred no appellate jurisdiction because the appeal was not from any final judgment. In other words, the failure of the circuit court to enter up a judgment for the parties on the affirmance of the award, deprived the appellate court of jurisdiction. The case was remanded to the circuit court with directions to set aside the order appealed from and to enter a judgment in accordance with the decision of the court. The effect of the decision, however, was not to deny finally the right of appeal because, when the circuit court does enter a final judgment, then an appeal may be taken from that judgment.

As in former years, the court has consistently refused to entertain ju-

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1. 134 S. W. (2d) 112, 115 (Mo. 1939).
2. 341 Mo. 215, 125 S. W. (2d) 833 (1939).

risdiction of causes where it is claimed that a constitutional question is involved, except in those cases where a real and substantial constitutional question has in fact been raised and actually requires decision. In other words, the court does not regard the provision of the constitution that the jurisdiction of appeals involving constitutional questions shall be in the supreme court, as intending to confer jurisdiction upon the supreme court by the mere suggestion that a constitutional question is involved.

In *Silberstein v. H-A Circus Operating Corp.*,[3] the claim of defendants that the petition did not state facts sufficient to invoke equitable relief and that the appointment of a receiver violated their constitutional right of trial by jury, was held to be merely one of claim of error in the trial court in passing upon the sufficiency of the petition and, if error, merely a misconstruction of the pleadings, and that the consequent denial of right of trial by jury did not lodge appellate jurisdiction in the supreme court. Again, in *State v. Sanderson*,[4] the real question in the case was the construction of the bus and truck law, appellants contending that the trial court erred in so construing the law as to give it a retrospective effect, and claiming that the enactment of retrospective laws are prohibited by the constitution. The court held that a constitutional question was not directly involved and retransferred the case to the proper court of appeals. So also, in *Laret Investment Co. v. Dickmann*,[5] the court held that where the question of constitutionality of a statute could have been but was not raised in the petition, such question could not be raised for the first time on appeal and that *amicus curiae*, even though they had had no previous opportunity to urge that question, must take the case as they found it on the record and that the appeal should have been taken to the proper court of appeals.

Notwithstanding the general rule that if any part of the case below involves questions on appeal conferring jurisdiction in the supreme court, the court in *Hyer v. Baker*,[6] refused to entertain jurisdiction of an appeal from an order granting an interpleader even though the questions involved in the main suit involved the title to real estate. The court held that the interpleader proceeding was a proceeding "distinct and separable from the original action" and that the issues on such an appeal, not being issues over which the supreme court has jurisdiction, should be decided by the

3. 124 S. W. (2d) 1207 (Mo. 1939).
4. 124 S. W. (2d) 1071 (Mo. 1939).
5. 134 S. W. (2d) 65 (Mo. 1939).
6. 130 S. W. (2d) 516 (Mo. 1939).

proper court of appeals and that it did not constitute a splitting up of issues for the court of appeals to consider the questions of interpleader.

The year's decisions again reflect the failure of some litigants to understand the difference between cases actually involving the title to real estate and cases only involving possession or control of real estate. For example, in *Rust v. Geneva Investment Co.*,[7] the court refused to entertain jurisdiction because the issues only related to the appointment of a temporary receiver for property which was the subject of a foreclosure and did not directly involve title (as distinguished from possession) to real estate; and in *In re Ellis*,[8] an action involving an application for directions for the construction of a will, the court, in transferring the appeal to the proper court of appeals, pointed out that the validity of the will was not in dispute and that the effect of the controversy was not to involve title but that the matter about which there was a contest only collaterally or incidentally related to the title to real estate. So, also, in *Peters v. Kirkwood Federal Savings & Loan Ass'n*,[9] where the action was one to set aside a foreclosure sale under a deed of trust on the ground that the note secured thereby had been fully paid, the court pointed out that there was no claim that the deed of trust was void *ab initio*, but only that it should not be enforced because of the fact that it had been paid. After analyzing prior decisions quite fully, the court reached the conclusion that title is only indirectly involved and transferred the case to the proper court of appeals.

So, also, in *Peoples Finance Corp. v. Lincoln*,[10] the court held that it had no jurisdiction of an unlawful detainer action since title to real estate could not be directly involved. It was there stated: "By the very terms of the statutes defining unlawful detainer, a proceeding of such nature can only be a possessory action. In addition, there is an express statutory prohibition against inquiring into the merits of title to the real property involved in such an action."

Again, in *Gentemann v. Dyer*,[11] the court again pointed out that an action in ejectment was one where the judgment does not determine title "in the modern sense," but is an action for possession and damages only and does not involve title to real estate within the meaning of the constitutional provisions with reference to the jurisdiction of the supreme court.

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7. 124 S. W. (2d) 1135 (Mo. 1939).
8. 127 S. W. (2d) 441 (Mo. 1939).
9. 344 Mo. 1067, 130 S. W. (2d) 507 (1939).
10. 131 S. W. (2d) 520, 521 (Mo. 1939).
11. 132 S. W. (2d) 1022 (Mo. 1939).

And in *State ex rel. Pemberton v. Shain*,[12] where the action was one based upon a contract to make joint wills affecting the title to real estate, the court again points out that where the judgment sought or rendered would take title from one litigant and give it to another, title would be involved within the meaning of the constitution and that jurisdiction of such cases rests in the supreme court. Accordingly, the court, on *certiorari* (again affirming the rule that in a *certiorari* of that nature the entire record is before the court for examination), the court quashed an opinion of the court of appeals and retained jurisdiction of the case on its merits and ordered it set down for argument and decision. So, also, in *Diebold v. Diebold*,[13] the court refused to entertain jurisdiction of an appeal in a suit involving construction of a will where there was no dispute as to the title to the real estate, but the dispute was only as to the manner of its disposition. The court again points out that in order to invest the supreme court with jurisdiction on the ground that title to real estate is involved "the title must be in dispute, that is, there must be a title controversy to be settled."

While the court refused to entertain jurisdiction of the appeal in *Cardwell v. Howard*,[14] where the judgment appealed from was against a consolidated school district, holding that the school district was not a political subdivision of the state within the meaning of Section 12, Article VI of the constitution and that the appealing directors of the school district were not state officers in the constitutional sense, pointing out that the term "state officer" as used in the constitution "has reference to officers whose official duties and functions are co-extensive with the state," the principle there applied must not be confused with the principle involved in the case of *State ex rel. Goodman v. Heath*.[15] The latter case was a proceeding in *quo warranto* to oust a school director on the ground that he was not qualified to hold the office. The court entertained jurisdiction because the office of school director is an office "under this state." These two cases involve two separate clauses of the constitution. The *Cardwell* case is controlled by the clause conferring jurisdiction on the supreme court "in cases where a county or other political subdivision of the state or any *state officer* is a party." As already stated, the term "state officer" means only those officers whose official duties and functions are co-extensive with the state. On the other hand, the *Goodman* case is controlled by the clause

12. 344 Mo. 15, 124 S. W. (2d) 1087 (1939).
13. 133 S. W. (2d) 401 (Mo. 1939).
14. 132 S. W. (2d) 960 (Mo. 1939).
15. 132 S. W. (2d) 1001 (Mo. 1939).

conferring jurisdiction in cases involving "the title to any office *under* this state". The court, citing former authorities, views the phrase "office under this state" as relating to offices created by the statutes of this state. The distinction between these two clauses of the constitution, while a narrow one, is nevertheless a well marked distinction which should be kept in mind in order to determine the proper appellate forum.

As in former years, appeals in compensation cases still seem to find their way to the wrong court. In two cases, *Hanley v. Carlo Motor Service Co.*,[16] and *State ex rel. Brown & Williamson Tobacco Corp. v. Workmen's Compensation Commission*,[17] the appeals were transferred to the proper appellate courts because the jurisdictional amount did not affirmatively appear from the record. Both were compensation cases where there was an award of $20.00 per week for 300 weeks and thereafter a further amount for the life of the claimant. In both cases the Compensation Commission commuted the award, finding an amount due in excess of $7500.00. Appellants did not complain of the award, but denied the validity of the commutation order, and the court held that the necessary jurisdictional amount was not actually involved.

In *Sayles v. Kansas City Structural Steel Co.*,[18] the court again considered the difference between a compensation award to an injured employee, payable in weekly installments and an award payble to the surviving dependent of a deceased employee, also payable in installments, as it affects the jurisdiction of the supreme court. After again reviewing the authorities, the court declined to overrule the case of *Shroyer v. Missouri Livestock Commission Co.*,[19] pointing out that "the Shroyer case points out the distinction, as affecting our appellate jurisdiction, between an award to dependents on account of death and an award for disability to the injured employee."

Thus the rule is now well settled that an award for disability, payable in weekly installments, the total amount of which would exceed $7500.00, will not be sufficient to place appellate jurisdiction in the supreme court because of the fact that it does not certainly appear either that the disability will continue or the employee shall live, so that the amount certainly to be paid would exceed $7500.00; while in death cases the statute contemplates a single death benefit, and the fact that it is to be paid in weekly install-

16. 344 Mo. 267, 126 S. W. (2d) 229 (1939).
17. 126 S. W. (2d) 230 (Mo. 1939).
18. 344 Mo. 756, 128 S. W. (2d) 1046 (1939).
19. 331 Mo. 1219, 61 S. W. (2d) 713 (1933).

ments which would cease upon the death or remarriage of the widow does not operate to deprive the supreme court of jurisdiction. As was said in the *Shroyer* case, "the possibility that this amount might thereafter be reduced by the death or remarriage of the dependent would obviously not change the amount that was actually in dispute at the time the judgment was rendered and the appeal allowed in this court."

In other respects, the constitutional provision that the jurisdiction shall be in the supreme court in those cases where the amount involved is more than $7500.00, has not been made the subject for judicial review.

II. Forms of Briefs and Abstracts

In only a few opinions during the past year has the court found it necessary to complain of the forms of abstracts and briefs in cases presented to it. And in those few cases where such complaints have been made, the tendency of the court has been to waive the requirements of its rules whenever the interests of justice require it.

Thus, in *Rishel v. Kansas City Public Service Co.*,[20] the appellant's abstract was defective in that it brought up only the instructions complained of, did not include other instructions in the case which were given, and omitted much of the evidence. Respondents filed a motion to dismiss the appeal. Thereupon, the appellants, within six days of the time the cause was set for argument, and without the consent of court or opposing counsel, filed a supplemental abstract. The court points that the record discloses no valid reason for the exercise of the discretion of the court to permit the filing of an additional abstract and that the supplemental abstract clearly presents new issues for consideration, holding that:

> "To permit it to be filed and considered would tend to defeat the very purpose of the rules adopted by the court to secure the orderly consideration of the record in cases presented on appeal."

But, although the court ruled that the first abstract of the record was insufficient to enable the court to pass upon the action of the trial court in refusing appellants' instructions, the instructions were, nevertheless, reviewed in the light of the showing made by the supplemental abstract, the court reaching the conclusion that if the supplemental abstract is considered, the instruction still could not be regarded as erroneous. While the motion to dismiss might well have been sustained, the court overruled the motion

20. 129 S. W. (2d) 851, 854 (Mo. 1939).

and affirmed the judgment below because there had been no affirmative showing of error in the record.

Again, in *Brown v. Citizens State Bank,*[21] although the court was of the opinion that the statement of facts contained in appellant's brief was inadequate and failed to set forth essential facts necessary for a consideration of the issues on appeal, the penalty of the rule was not applied, but the court carefully reviewed the record and decided the appeal upon the merits. In that case, one of the principal issues on the appeal was whether or not a demurrer to the petition should have been sustained. Logically, a consideration of that issue required a detailed examination of the actual allegations of the petition rather than a statement about them.

In one case, *Produce Exchange Bank v. Winn,*[22] an appeal was dismissed for failure of the appellant to comply with the rule requiring a proper statement of facts. The appeal was from a decree in equity which the court was, of course, required to review *de novo,* but the appellant's statement presented only the appellant's evidence and version of the questioned transaction and totally ignored the respondent's evidence and version of the same transaction. The court, in dismissing the appeal, quoted from prior authorities to the effect that the statement is primarily "in aid of an immediate, accurate, complete and unbiased understanding of the facts of the case, without which there can be no proper administration of justice. A statement that does not fairly present the facts, not only fails to accomplish this purpose; it is in fact pernicious to the extent that it conveys in the first instance a false, distorted, or imperfect impression as to the facts of the case."

But even in dismissing that appeal, it is obvious that the court did review the record, because the opinion points out much evidence not referred to in appellant's statement to which the chancellor below might have given consideration, calls attention to the well-known rule that the findings of fact of the chancellor will ordinarily not be disturbed on appeal, and concludes that there is nothing upon which the court could determine that the conclusions of the chancellor were against the weight of the evidence.

21. 134 S. W. (2d) 116 (Mo. 1939).
22. 133 S. W. (2d) 418, 423 (Mo. 1939).

III. Effect of Decisions.

In *Creason v. Harding,*[23] the court reviewed and again declared the difference between a prior opinion in the same case which, on the second trial or appeal must be regarded as the law of the case, and a prior opinion which must be regarded as *res adjudicata.* It is only in those cases where the first remand confines the re-trial to certain issues only that all other issues are determined on the first appeal. In all other cases, that is, where the remand is general, if the facts on the second trial present a different case, the trial court will be bound by the prior decision only insofar as the principles of law declared in the prior decision are applicable to the new state of facts.

In *Sheehan v. Terminal R. R. Ass'n,*[24] the court had held on a former appeal that the action was governed by the Federal Employers' Liability Act. The case was re-tried without amendment of the pleadings and the proof on the second trial was substantially the same. The court points out that its prior opinion constitutes the law of the case and was binding on the court at the second trial, citing the *Creason* case. But in *State v. White,*[25] the court refused to follow an earlier opinion of the court as binding law, pointing out that the former opinion, while receiving the concurring votes of a majority of the judges as to result, did not receive a carrying vote insofar as the point involved was concerned and could not be considered as authoritative.

In *Martin v. Southwestern Bell Telephone Co.,*[26] the court held that where a rehearing had been granted, the appellant was not limited, on the rehearing, to the points briefed at the first hearing, but that appellant has a right to present points not briefed on the first petition. The court points out that when a rehearing has been granted, the case stands on the docket as though it had not been heard at all, and that the parties may brief any point preserved for review even though not mentioned on the first petition.

23. 344 Mo. 452, 126 S. W. (2d) 1179 (1939).
24. 344 Mo. 586, 127 S. W. (2d) 657 (1939).
25. 126 S. W. (2d) 234 (Mo. 1939).
26. 344 Mo. 83, 125 S. W. (2d) 19 (1939).

CONSTITUTIONAL LAW

WILLIAM R. COLLINSON*

Our supreme court mentions some principle of constitutional law in twenty-four of the cases which it decided in 1939. In many of these cases the constitutional point was not discussed, but some well-established constitutional principle was simply stated by the court in the course of the opinion. In this article the cases of this nature will simply be classified and only those cases will be discussed in which the constitutional point was the determining factor in the decision of the case.

I. CONSTRUCTION, OPERATION, AND ENFORCEMENT

In the case of *National Cemetery Assn. v. Benson*,[1] the court held that Article X, Section 6, of the state constitution is self-enforcing. This provision of our constitution exempts the property of cemeteries from taxation, and, as pointed out by the court, the constitutional provisions declaring that certain property should be exempt from taxation are generally self-enforcing and need no legislation to be effective. The court further held in this case that such provision should be strictly construed and that the burden is on the property owner to establish that his property comes within the constitutional exemption. In this case the court ruled that land held by a cemetery association but which had not been "set apart" for the burial of the dead did not come within the exemption.

In *Nodaway County v. Tilson*,[2] the court held that no constitutional question was presented when the defendant's pleading did not challenge the constitutionality of statutes pleaded in the petition, and when the assignments of error did not raise a constitutional question, and no section of the constitution was cited in points and authorities in the appellant's brief.

In the case of *State ex rel. School District No. 24 v. Neaf*,[3] the supreme court *en banc* denied an application for *mandamus* to repeal the assessment and taxation of certain mains, pipes, and hydrants of the St. Louis Water Company which were not located within the relator school district. Prior to the 1937 amendment of Section 9977, Missouri Revised Statutes, 1929, these

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*Attorney, Springfield. A.B., Drury College, 1933; LL.B., University of Missouri, 1935.

1. 344 Mo. 784, 129 S. W. (2d) 842 (1939).
2. 129 S. W. (2d) 915 (Mo. 1939).
3. 344 Mo. 905, 130 S. W. (2d) 509 (1939).

mains, pipes, and hydrants had been assessed as appurtenances to the land upon which the power plant was located. The amendment provided that such mains and pipes should be treated as personal property for tax purposes and taxable where situated. After the amendment, the assessor assessed the mains and pipes in the school districts where located and this action was brought to compel their assessment as appurtenances, it being claimed that the amendment was unconstitutional as an arbitrary and unreasonable classification. The court denied the writ on the principle that it would not pass on the constitutional question in *mandamus* unless there was an extraordinary emergency or the legislative enactment attacked was clearly unconstitutional. The court pointed out that the presumption was that the statute was constitutional and that the many other municipalities and school districts in St. Louis were directly interested and that no emergency existed. For this reason the court concluded that the constitutional question could be fully determined upon a full trial of the cause.

The case of *Laret Investment Co. v. Dickmann*,[4] appears to have been a test case to determine whether or not the property of the Housing Authority of the city of St. Louis would be tax exempt under the constitutional provision exempting the property of municipal corporations from taxation.[5] The Housing Authority is a corporation duly organized, pursuant to the Housing Act of 1939,[6] which act declares that the Housing Authority is a municipal corporation but which does not specifically exempt its property from taxation. The court pointed out that this declaration that the Housing Authority was a municipal corporation was not binding upon the supreme court, but was entitled to great weight by the court. The court discussed previous definitions of municipal corporations in this state, and held that under principles previously laid down by the court, and under the overwhelming weight of authority in the country as a whole, the Housing Authority was a municipal corporation and its property exempt from taxation.

II. Distribution of Governmental Powers and Functions

It is a primary principle of constitutional law that the courts must take the statutes as they find them and cannot write laws, under the guise of construction, which the legislature did not see fit to enact. Some constitutional writers have intimated that most courts recognize this rule more

4. 134 S. W. (2d) 65 (Mo. 1939).
5. Mo. Const. art. X, § 6.
6. Mo. Laws 1939, pp. 488-502.

by its breach than by its observance, but such a criticism cannot be directed at our supreme court for the year 1939. The court repeated over and over again that if laws needed changing, it was for the legislature to change them, and that the wisdom of, and reasons for, the enactment of legislation was not for the court to inquire into, if the legislation did not violate provisions of our constitution. These well-established principles can be found in several cases,[7] sometimes only mentioned in passing and in some cases discussed at some length.

Excellent discussion of this question will be found in the case of *Poole & Creber Market Co. v. Breshears*,[8] in which the constitutionality of the statutes prohibiting the sale of filled milk was involved.

In the case of *Lime v. Blagg*,[9] the court held that the governor's constitutional power to issue and revoke sick paroles to state prisoners was beyond the range of judicial or legislation encroachment.

III. Police Power

In the case of *Poole & Creber Market Co. v. Breshears*, the supreme court upheld the constitutionality of Sections 12408, *et seq.*, Missouri Revised Statutes, 1929, prohibiting the sale in this state of filled milk. The court ruled that this prohibition was a valid exercise of the police power of the state. These statutes were attacked as violating the due process clauses of the Federal and State Constitutions and as being special laws in violation of Article IV, Section 53, Sub-Section 32 of the state constitution. The court held that no laws touch public welfare more closely than those relating to food, and pointed out the importance of milk as a food. The court had a great deal of precedent for this decision, including the late case of *United States v. Carolene Products Co.*,[10] and numerous cases from other states cited in the opinion.

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7. Poole & Creber Market Co. v. Breshears, 343 Mo. 1133, 125 S. W. (2d) 23 (1939); State *ex rel.* Wilkerson v. Skinker, 344 Mo. 359, 126 S. W. (2d) 1156 (1939); State *ex rel.* Mills v. Allen, 344 Mo. 743, 128 S. W. (2d) 1040 (1939); Sayles v. Kansas City Structural Steel Co., 344 Mo. 756, 128 S. W. (2d) 1046 (1939); Lime v. Blagg, 131 S. W. (2d) 583 (Mo. 1939); Hull v. Baumann, 131 S. W. (2d) 721 (Mo. 1939); Emery v. Holt County, 132 S. W. (2d) 970 (Mo. 1939); Artophone Corporation v. Coale, 133 S. W. (2d) 343 (Mo. 1939); State v. Wipke, 133 S. W. (2d) 354 (Mo. 1939); Conn v. Chestnut Street Realty Co., 133 S. W. (2d) 1056 (Mo. App. 1939); Laret Investment Co. v. Dickmann, 134 S. W. (2d) 65 (Mo. 1939).

8. 343 Mo. 1133, 125 S. W. (2d) 23 (1939).

9. 131 S. W. (2d) 583 (Mo. 1939).

10. 304 U. S. 144 (1938).

IV. Obligation of Contracts

In *Robinson v. Nick*,[11] a contention was made that an interlocutory order appointing a receiver violated Article II, Section 15, of the state constitution. That is the Section prohibiting legislation impairing the obligation of contracts, and the court pointed out the well-established rule that such a constitutional prohibition had no application to an order of a court.

V. Equal Protection

As pointed out before, our supreme court held, in *Poole & Creber Market Co. v. Breshears*, that our statutes prohibiting the sale of filled milk did not violate the equal protection clause, because said statutes were a valid exercise of the police power of the state.

In *State v. Logan*,[12] the appellant, a negro defendant in a criminal case, claimed that he had not been afforded the equal protection of the laws because he "did not have a chance to have any negroes on the jury of twelve men." The record showed that six of the forty-one talesmen from whom the jury panel of thirty was selected were negroes, four of whom were disqualified for cause, and the other two peremptorily challenged by the state. The court held that this conclusively showed that negroes were not discriminated against in drawing the jury panel, and that the constitutional guaranty was not a guaranty to a negro defendant of a right to have negroes on the jury.

The case of *Beverly Hills v. Schulter*,[13] upheld the validity of a city ordinance imposing a license tax on gasoline dealers, when no license tax was imposed upon any other retail business. The ordinance was attacked as violating Section 3, Article X, of our constitution, which provides that taxes shall be uniform, as violating the due process clauses of the State and Federal Constitution, and as in violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. All of these contentions were overruled by the court upon the principle that the tax was uniform, because gasoline dealers constituted a taxable class, and such was a reasonable classification for tax purposes.

The case of *State ex rel. Gaines v. Canada*,[14] was again before our supreme court in 1939, after the reversal by the United States Supreme Court

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11. 134 S. W. (2d) 112 (Mo. 1939).
12. 344 Mo. 351, 126 S. W. (2d) 256 (1939).
13. 344 Mo. 1098, 130 S. W. (2d) 532 (1939).
14. 344 Mo. 1238, 131 S. W. (2d) 217 (1939).

of the former opinion.[15] After the decision by the United States Supreme Court, the legislature amended Section 9618 of our statutes, by eliminating any discretion in the Board of Curators at Lincoln University, and requiring them to create new departments and courses of instruction to afford training for negroes equal and the same as that furnished at the State University; and the legislature further appropriated $200,000 for that purpose. In view of this change in the law, our State Supreme Court remanded the case with directions that if the facilities available at the beginning of the next school year at Lincoln University were substantially equal to those at Missouri University, the writ would be denied, and otherwise it should issue.

In the case of *Hull v. Baumann*,[16] the constitutionality of House Bill 677 of the 60th General Assembly,[17] was attacked as unconstitutional under both the Federal and State Constitutions. This particular bill amended the Jones-Munger Act by enacting new sections applying only to counties, or cities in a county, which have a population in excess of 700,000, and to counties which have a population of not less than 200,000 and not more than 400,000. The amendment constituted provisions providing for suits to collect back taxes. The plaintiff contended that the act was unconstitutional as a local and special law, for the reason that it applies only to the city of St. Louis and St. Louis County. A lengthy statement of facts was agreed upon in this case which conclusively (and conveniently) showed a need for this specific legislation in the city of St. Louis and in St. Louis County, a need which does not exist in rural counties. However, the court took judicial notice of the fact that Jackson County has a population greater than that of St. Louis County, and the court indicated that for that reason this legislation might have been held unconstitutional as an unreasonable classification and as a special law if it stood alone. However, the court pointed out that at the same session of the General Assembly another bill was passed, practically the same as this one, applying to Jackson County, and the constitutional questions were ruled in favor of the constitutionality of the statute.

In the case of *State v. Wipke*,[18] the provisions of the Liquor Control Act requiring a bond in the penal sum of $2,000 by all licensees who sell liquor by the drink, was attacked as unconstitutional under Section 25, Article II, of our constitution, which is the provision prohibiting excessive bails and

15. 305 U. S. 337 (1938).
16. 131 S. W. (2d) 721 (Mo. 1939).
17. Mo. Laws 1939, p. 878.
18. 133 S. W. (2d) 354 (Mo. 1939).

excessive fines, and also as violating the equal protection clause of the Federal and State Constitution. The court overruled both these contentions and held that the act was constitutional.

In the case of *Kay v. Moniteau County*,[19] the plaintiff attempted to collect his back salary, as prosecuting attorney, on a population basis determined by multiplying the number of votes cast by five, rather than upon the official census, even after the official census had been compiled. The plaintiff contended that the County of Moniteau had not ascertained the population according to the census, because the county officials had never received a certified copy. On appeal the plaintiff argued that he had been denied equal protection of the law by the trial court because the judgment of the trial court (against him) had placed the burden and duty of ascertaining the census from the census bureau upon the plaintiff and relieved the county court of that duty. The supreme court overruled this contention without comment.

VI. Due Process

The case of *Ussery v. Haynes*,[20] raised an interesting question of due process. The action was for false imprisonment, the plaintiff therein having been adjudicated insane by a county court and confined in a state institution. At the time of her adjudication, the statutes covering such a procedure contained no provision for notice to the alleged insane person.[21] In this case a formal notice was issued by the clerk of the county court and given to the physician who was directed to examine her. The evidence showed that the physician read the notice to her twice and explained the notice in detail, but no copy was left with her. Since there were no provisions for service of notice or the manner of service, the court discussed the question as to whether or not such service as this, without leaving a copy and by a private individual, not an officer, constituted the necessary notice to the defendant in the insanity proceedings, and came to the conclusion that it did not. The court further pointed out that the fact that the alleged insane person appeared by attorney before the court could not supply the want of notice, because her attorney was appointed by the county court and not employed by her. This case appears to follow well-established principles of the necessity of notice and an opportunity to be heard in order to have due process of law.

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19. 134 S. W. (2d) 81 (Mo. 1939).
20. 344 Mo. 530, 127 S. W. (2d) 410 (1939).
21. This defect has been cured by amendment, see Mo. Laws 1937, p. 512.

The several other cases in which due process questions have been raised have already been discussed.

VII. Rights of Justice and Remedies for Injuries

In the case of *State v. Davit*,[22] the court, in the conclusion of its opinion, criticized the conduct of the State's Attorney and said, "A defendant—any defendant—in a criminal case is entitled to the rights which a statute gives him. No court can refuse to enforce them where the record calls for it." While not deciding any new point of law or establishing any new principle, we pass this language on in the belief that it is an excellent, quotable judicial utterance.

In the case of *State ex rel. National Refining Co. v. Seehorn*,[23] the protection of Article II, Section 10, of our state constitution was invoked by one of the parties. This Section, which says, "The courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property, or character," has caused the courts of this state no little trouble in the past. In this case a husband had sought damages for the loss of society and services of his wife. The husband died before trial and the suit was revived by the husband's administrator. This suit was a proceeding in prohibition challenging the revival of the suit in the administrator's name, the contention being that such a cause of action did not survive. The court held that this cause of action did not survive at common law, and did not survive by reason of Sections 97-99, Missouri Revised Statutes, 1929, and that the quoted constitutional provision was not intended to create any new rights of action which were not recognized and were not in existence at the time of the adoption of the constitution, but was only designed to protect those causes of action recognized at common law.

VIII. Miscellaneous

The case of *McDonald v. Pacific States Life Insurance Co.*,[24] presented an interesting question to the court. The defendant life insurance company was a corporation of Colorado, and had been found insolvent by a Colorado court and placed in liquidation under the statutory provisions of Colorado. Under the Colorado Act, the Colorado insurance commissioner was the liquidator. The Missouri plaintiff had secured a judgment against

22. 343 Mo. 1151, 125 S. W. (2d) 47 (1939).
23. 344 Mo. 547, 127 S. W. (2d) 418 (1939).
24. 344 Mo. 1, 124 S. W. (2d) 1157 (1939).

this company in Missouri, and, by discovering assets in this state, had secured a preference by an execution, which was attacked in this case. The precise question presented to the court was whether the proceedings in Colorado under the Colorado Act should be given such effect in Missouri as to prevent a Missouri creditor from securing a preference. There is no question but that the powers of a receiver appointed by a court of equity extend no further than the territorial limitation of the jurisdiction of the court making the appointment, and if the liquidator had occupied no greater status than that of an equity receiver, the courts of Missouri would not have to recognize his power or title to the property of the corporation located in this state. However, it has been held by no less an authority than the United States Supreme Court, in the case of *Clark v. Williard*,[25] that a statutory liquidator holds title to the property of a corporation, not by a court decree, but succeeds to all its right and the title to the corporation's property under the laws of the state of incorporation, which laws are part of the corporation charter. From some of the cases cited in this opinion, it appears that the courts of some states have felt that they are bound under the full faith and credit clause of the Federal Constitution to fully recognize the title of the statutory liquidator of another state, and that the courts of other states hold that they will recognize the title under the principles of comity. The *Clark* case, seems to incline to the latter view, in which case, of course, the public policy of the jurisdiction of the forum would have to be taken into account. In this case the Missouri Supreme Court held that the public policy of a state is defined by its legislative enactments, or by its courts of last resort, or by both, and that the question presented was one of first impression in this state. The court then held that the public policy of this state should be to prevent creditors of insolvent insurance companies from securing preferences, and to protect the assets for the benefit of all creditors.

25. 292 U. S. 112 (1934).

CORPORATIONS

TALBOT SMITH*

The decisions of the court relating to the law of corporations covered, during the year under consideration, as in years past, a wide range, reflecting the universality of employment of the corporate form as a business device. Certain of what are regarded as the more significant of the decisions are commented upon herewith. No attempt has been made to exhaust the subject in any instance, and only so much of the general law as forms a background for the decision under consideration has been treated.[1]

I. PLEDGE OF CORPORATE ASSETS

In the case of *People's Bank of Butler v. Allen*,[2] the court was faced with one of the most controversial of modern banking questions—namely, the right of a banking corporation or other savings institution to pledge a portion of its assets for the ultimate security of a depositor.[3] A typical fact situation involves, as did the instant case, statutory requirement that the depository of public moneys furnish bond or other security for the proper return of such funds. Deposit is then made by the public custodian and security furnished. It may consist of a direct pledge of assets by the bank to the depositor, or, in the alternative, it may involve the execution of bond conditioned upon proper return of the funds involved, in which case the pledge of assets involved may be made to the surety on the bond. This latter was the method adopted in the *People's Bank* case, the sureties in such case being directors of the bank rather than a commercial surety company.[4] Should the bank thereafter become insolvent, the legal question

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*Associate Professor of Law, University of Missouri. B.S., United States Naval Academy, 1920; M.S., University of Michigan, 1927, J.D., 1934.

1. In addition to the decisions commented upon, the following are regarded as worthy of additional note: People's Finance Corp. v. Buckner, 344 Mo. 347, 126 S. W. (2d) 301 (1939) (corporation managerial contract calling for devotion of entire time to corporate business); *In re* Franz Estate, 344 Mo. 510, 127 S. W. (2d) 401 (1939) (rights to purchase additional stock as part of corpus of estate); State *ex rel.* Lee v. Sartorius, 344 Mo. 912, 130 S. W. (2d) 547 (1939) (construction of agreement with Participation Holders Supervisory Committee); Johansen v. St. Louis Union Trust Co., 131 S. W. (2d) 599 (Mo. 1939) (law governing stockholder's liability to corporation's creditors as law of domicile); Rossi v. Davis, 133 S. W. (2d) 363 (Mo. 1939) (corporation as necessary party defendant).

2. 344 Mo. 207, 125 S. W. (2d) 829 (1939).

3. Only that portion of the problem relating to the deposit of public funds is treated in this article.

4. Appellant's abstract of the record (p. 45) indicates that the bank was

is usually presented, as it was in the instant case, by the receiver's demand upon the pledgee for a return of the collateral without a return of the full amount deposited. The problem may, on the other hand, be raised by the pledgee's attempt to foreclose the security.[5]

In view of the opposing considerations, involving, as they do, questions of the relative rights of secured and unsecured creditors, and of large and small depositors both public and private, the problem will be seen to be one of considerable economic complexity. The legislature's naked direction to the banking corporation to furnish bond with surety [6] contains no guiding declaration of policy for the courts when the facts under consideration involve a variation from the precise situation apparently contemplated in the statute. In such a case, of which *People's Bank* is an example, the problem resolves itself into one of implied corporate power, the act in question being *intra vires* or *ultra vires* depending upon the court's answer to the question of power.

The precise question presented, then, is that of the policy or impolicy of the secured deposit as a means of attracting or holding bank deposits, and the decisions in the field reflect the confusion existing in the courts with regard to beliefs as to the wisdom of the practice. To a court holding the view that, apart from statute, a banking corporation has the implied or inherent right to pledge a portion of its assets to secure public funds,[7] it is a short step, though not an inevitable one, to the next position, that it may also pledge its assets to secure the surety on bond given for the same purpose,[8] especially in view of the consideration that had security in fact been given the depositor itself, the surety might be subrogated to such depositor's rights.[9]

On the other hand, should the court take the view that the secured bank deposit is to be condemned by reason of its being a means for preferring

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unable to obtain a Surety Company bond, due (p. 2 appellant's brief) "to the exigencies of the times" (1931).

5. See Texas & Pac. Ry. v. Pottorff, 291 U. S. 245 (1934).

6. Mo. Rev. Stat. (1929) §§ 6794, 12187.

7. Williams v. Hall, 30 Ariz. 581, 249 Pac. 755 (1926); Richards v. Osceola Bank, 79 Iowa 707, 45 N. W. 294 (1890). The cases are collected in (1930) 65 A. L. R. 1412; (1933) 87 A. L. R. 1456; (1936) 101 A. L. R. 515; (1938) 112 A. L. R. 483.

8. Fulton v. Lloyds Casualty Co., 75 F. (2d) 295 (C. C. A. 6th, 1935); McFerson v. National Surety Co., 72 Colo. 482, 212 Pac. 489 (1923); Page Trust Co. v. Rose, 192 N. C. 673, 135 S. E. 795 (1926); Grigsby v. People's Bank, 158 Tenn. 182, 11 S. W. (2d) 673 (1928). *Contra*: Commercial Banking & Trust Co. v. Citizens Trust & Guar. Co., 153 Ky. 566, 156 S. W. 160 (1913).

9. See Mothersead v. United States Fidelity & Guar. Co., 22 F. (2d) 644 (C. C. A. 8th, 1927), *cert. denied sub. nom.*, Schull v. Fidelity & Guar. Co., 276 U. S. 637 (1928).

one creditor over another, and thus arguably detrimental to the best interests of the depositing public, it will not only declare *ultra vires* the pledge to the depositor,[10] or to the surety on the depository's bond,[11] but will also construe relevant statutory enactments in such a way as to discourage the practice.[12] Thus the decisions in the field show great diversity of result, depending upon the court's view as to the wisdom or desirability of the secured bank deposit as an instrument of banking practice.

In Missouri the decisions on the point are not numerous. It should be noted that our statutes sanction the direct pledge to the public depositor in certain instances of specified securities in lieu of bond,[13] and the validity of pledges made in reliance thereon have been upheld by our courts.[14] In the *People's Bank* case, however, the court refused to extend the doctrine to a pledge made to the sureties on the bond and thus we may be justified in examining the problem anew. The divergence in the opinions remits us, then, to a consideration of the policy of the pledge device. It has been argued in favor thereof that "arrangements" for the safeguard of public moneys cannot be deemed contrary to public policy[15] but the statement proves too much. "Arrangements" is a term of broad meaning and it seems difficult to justify on principle an arrangement for the safeguard of public funds which amounts in effect to a tax upon a few, the depositors of the bank, for the benefit of the many. The small depositors so levied upon are entirely without the bargaining power of the large depositors and it would seem that the tendency of the courts should be toward their protection rather than their exploitation. Such protection was, in fact, the theory of the federal deposit insurance plan.[16] Not only, then, does an interpretation of a grant of incidental power to a banking corporation to pledge its assets for the purpose of securing a public depositor enable the bank to favor, in effect, one creditor over another, but it also makes possible the procuration of depositors by a species of misrepresentation, if the pledging is in fact secret and the pledged assets appear as unincumbered assets in the financial

10. Divide County v. Baird, 55 N. D. 45, 212 N. W. 236 (1926).
11. Commercial Banking & Trust Co. v. Citizens Trust & Guar. Co., 153 Ky. 566, 156 S. W. 160 (1913).
12. Arkansas County Road Imp. Dist. v. Taylor, 185 Ark. 293, 47 S. W. (2d) 27 (1932).
13. Mo. Rev. Stat. (1929) § 12187.
14. Huntsville Trust Co. v. Noel, 321 Mo. 749, 12 S. W. (2d) 751 (1928). Note also Consolidated School Dist. v. Citizens Sav. Bank, 223 Mo. App. 940, 21 S. W. (2d) 781 (1929).
15. Frazer, J., in Cameron v. Christy, 286 Pa. 405, 410, 133 Atl. 551, 552 (1926).
16. 48 Stat. 168 (1933), 12 U. S. C. A. § 264 (1934).

statement of the bank. There seems much that can be said against the practice of permitting a banking corporation to secure any depositor, public or private, by a pledge of the bank's assets, and it has been asserted that the trend of the recent decisions is against the practice.[17] Although our court, then, in refusing to uphold the validity of the pledge made to the sureties on the bond, takes what may at the present time be a minority position,[18] it is in line with the alleged modern trend to restrict the employment of the pledge device by banking corporations, and, broadly speaking, the policy has much to commend it.

There is one aspect of the court's opinion, however, that seems doubtful in principle. The agreement (of pledge) between the bank and its individual director-sureties is described as not arising "to the dignity of a contract" because one man cannot contract with himself,[19] the court citing in support thereof a passage in *Corpus Juris*[20] relating to the elementary doctrine in the law of contracts that it requires two parties to make a binding contract. If this statement is made to describe the *result* of the *ultra vires* contract it may be sound, but it cannot be one of the reasons why the agreement is bad in the first place unless we assume the answer to the very question we are investigating. In other words, if the contract, otherwise valid, is in fact *intra vires* it is between the bank, the corporate entity, on the one hand, and the individual directors on the other, and there are thus two separate and distinct parties. The same reasoning, believed to be erroneous, was observed in the case upon which the principal case rests, *Frankford Exchange Bank v. McCune*.[21] Even though the orthodox entity theory be discarded and the corporation thought of as a business group, treated for certain purposes as if it were a separate individual, it is questionable, from a procedural point of view, if this should be one of the places for looking at the individuals rather than the group.[22]

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17. Note (1934) 47 HARV. L. REV. 1017.

18. This has been termed the minority view in this respect. See (1931) 79 U. OF PA. L. REV. 608, 612.

19. That the agreement was between the banking corporation itself and the directors as individuals seems clear. The transfer of assets to the individual directors for purposes of security obviously must come from the corporation. Also note the language of the court, 344 Mo. 207, 212, 125 S. W. (2d) 829, 831 (1939): "The agreement *of the bank* for the hypothecation of the assets . . ." (italics ours)

20. 13 C. J. (1917) § 43.

21. 72 S. W. (2d) 155 (Mo. App. 1934).

22. As indicative of the present attitude towards this problem, note the liberal view taken by RESTATEMENT, CONTRACTS (1932) § 17.

II. Ultra Vires

It is often stated as a rule of law that an implied contract exists for the restoration of any benefits received by reason of an *ultra vires* contract as a condition precedent to either party's renunciation thereof.[23] Or, as it is occasionally put, if the corporation sets up the defense of *ultra vires* it must restore what it has received.[24] That this is a correct general principle cannot be doubted[25] and this jurisdiction seems in full accord therewith.[26] The rationale of the doctrine as thus stated is the unfairness of a contrary holding, or, as stated by a lower federal court, "it would be inequitable and unconscionable to hold otherwise."[27] When, however, insolvency intervenes and the rights of innocent creditors are involved, a number of recent well-considered cases have refused,[28] as did the Missouri court in the *People's Bank* case, to apply the doctrine. Superior equities are involved and the rights and equities of the original contracting parties are no longer controlling. As this case well illustrates, it is becoming increasingly difficult to make any broad statement of even reasonable validity in the field of *ultra vires.*

III. Punitive Damages

In the case of *State ex rel. United Factories v. Hostetter*,[29] involving, among other matters, the question of the award of punitive damages against a principal for the acts of an agent, the court took occasion to review the problem in general and to contrast the difference between the liabilities of corporate and individual principals in this respect.

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23. See 7 Fletcher, Cyclopedia of Private Corporations (Perm. ed. 1931) § 3571.

24. Atkins v. Shreveport & Red River Valley Ry., 106 La. 568, 577, 31 So. 166, 170 (1901).

25. Ballantine, Law of Corporations (1930) § 76.

26. "Certain it is that such a contract (*ultra vires*) is not voidable at the instance of the party receiving the consideration of the contract, without a restoration of what was received. (citing cases)" Sutton, C., in Wellston Trust Co. v. American Surety Co., 14 S. W. (2d) 23, 27 (Mo. App. 1929). Note also the following *dictum* of Graves, J., in Hanlon Millinery Co. v. Mississippi Valley Trust Co., 251 Mo. 553, 579, 158 S. W. 359, 364 (1913): "If the contract were only executed upon one side, then the plea of *ultra vires* would be unavailing, because a corporation cannot receive money to do a thing and fail to do that thing, and after keeping the money, excuse itself from liability by a plea of *ultra vires.*"

27. McVicar, J., in Smith v. Baltimore & O. R. R., 48 F. (2d) 861, 871 (W. D. Pa. 1931), *aff'd,* 56 F. (2d) 799 (C. C. A. 3rd, 1932).

28. Smith v. Baltimore & O. R. R., 48 F. (2d) 861 (W. D. Pa. 1931), *aff'd,* 56 F. (2d) 799 (C. C. A. 3rd, 1932); Sneeden v. Marion, 64 F. (2d) 721 (C. C. A. 7th, 1933), *aff'd,* 291 U. S. 262 (1934); Texas & Pac. Ry. v. Pottorff, 291 U. S. 245 (1934). *Contra:* State Bank of Commerce v. Stone, 261 N. Y. 175, 184 N. E. 750 (1933).

29. 344 Mo. 380, 126 S. W. (2d) 1173 (1939).

While it has been said that the award of punitive damages is "a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine,"[30] and in spite of much criticism of the doctrine,[31] it is firmly imbedded in the jurisprudence of the great majority of American jurisdictions.[32] The courts of this state have sanctioned the award of punitive or exemplary damages since early times when the circumstances of the injury involved acts of oppression or malice.[33] Since, however, the award of punitive damages is in the nature of punishment inflicted upon the defendant because of the quality of his acts, it is commonly held that an individual principal will not be forced to respond in exemplary damages for the malicious acts of his agent unless such principal personally acquiesced in, authorized, or ratified the act in question,[34] and the instant decision leaves no doubt that such is the attitude of the courts of this state upon this branch of the question.[35] It might be suggested, however, that since a principal's liability under the doctrine of *respondeat superior* is not based upon his personal fault but rather upon the burdens his activity should properly be called upon to bear,[36] it seems somewhat anachronistic to make fault the criterion in this particular type of case. Nor is it particularly satisfactory to distinguish punitive damages on the ground that they are "punishment" rather than compensation. Any award of damages involves some degree of punishment to the payor thereof. For these and similar reasons the distinction made in the instant case has occasionally been rejected.[37]

The attack upon payment of punitive damages by the corporate principal originally took an ingenious form, the classical metaphysical argument that has been conducive of much of the confusion in the law of corporations.[38] Since the malice of the defendant was an essential element in the award of punitive damages, and since the corporation, being both a soulless

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30. Garrison, J., in Haines v. Schultz, 50 N. J. L. 481, 484 (1888).
31. See 2 GREENLEAF, EVIDENCE (16th ed. 1899) § 253; HALE, DAMAGES (2d ed. 1912) §§ 87, 88; Willis, *Measure of Damages When Property is Wrongfully Taken by a Private Individual* (1909) 22 HARV. L. REV. 419, 420.
32. The cases are collected in (1914) 48 L. R. A. (N. S.) 35. MCCORMICK, in THE LAW OF DAMAGES (1935) § 78, states that only four jurisdictions, Louisiana, Massachusetts, Nebraska, and Washington, "definitely reject the doctrine altogether." See also 1 SEDGWICK, DAMAGES (9th ed. 1912) §§ 347-388.
33. Thus note remarks of Wagner, J., in Buckley v. Knapp, 48 Mo. 152, 162 (1871).
34. MCCORMICK, *op. cit. supra.* note 32, § 80.
35. See 344 Mo. 386, 392, 126 S. W. (2d) 1173, 1176 (1939).
36. This matter may be found more fully elaborated by the writer hereof in an article entitled *Scope of the Business* (1940) 38 MICH. L. REV. 1222.
37. Schmidt v. Minor, 150 Minn. 236, 184 N. W. 964 (1921).
38. STEVENS, PRIVATE CORPORATIONS (1936) §§ 1, 2, and 3.

and a brainless body, had no mind with which to conceive the required malice, it was argued that it could under no circumstances be called upon to respond in punitive damages.[39] This argument has long since been overthrown and it is now settled in the great majority of our jurisdictions[40] that the corporate principal, just as the individual principal, may be required to pay punitive damages in a proper case. Just what a proper case is, however, has occasioned considerable diversity of thought,[41] this jurisdiction in the instant case, reiterating its earlier position taken in the case of *Haehl v. Wabash R. R.*,[42] that since corporations can act only through agents, whenever the agent in the discharge of his duties acts in a wanton and malicious manner the corporation will be liable as though it had itself done the act.[43] The doctrine as thus stated should be feasible of efficient administration since the court will not be faced with questions of either command or ratification. Against the arguable hardship to the corporation arising from liability for increased damages for the purely malicious and wanton acts of an agent must be weighed the possible preventitive tendency as regards the corporation's choice, training, and retention of servants. There is doubtless much public approval of the words of Walton, J., in the *Goddard* case: "When it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their places, and not before."[44] One may ask, however, why this doctrine, if salutory, should be limited to corporations.

IV. Corporate Creditors

In the early case of *Attorney-General v. Utica Insurance Co.*,[45] Chancellor Kent expressed some doubt as to whether any visitatorial jurisdiction existed over corporations, save as to charitable corporations, in the court of chancery.[46] This view, or doubt, expressed by the learned chancellor,

39. Jeffersonville R. R. v. Rogers, 28 Ind. 1 (1867). The classical argument relating to the impossibility of imputing malice to a mere legal entity may also be found in Whitefield v. S. E. Ry., 96 E. C. L. 115 (1858), and Green v. London General Omnibus Co., 29 L. J. C. P. 13 (1859).

40. See cases collected in (1914) 48 L. R. A. (N. S.) 35.

41. Thus compare Western Union Tel. Co. v. Aldridge, 66 F. (2d) 26 (C. C. A. 9th, 1933) (no liability because no participation by corporate principal), commented upon in (1933) 12 N. C. L. Rev. 55, with Goddard v. Grand Trunk Ry., 57 Me. 202 (1869), making the corporation liable for exemplary as well as compensatory damages, the conduct of the corporate servant having been such as would render him liable for such damages.

42. 119 Mo. 325, 24 S. W. 737 (1893).

43. 344 Mo. 386, 390, 126 S. W. (2d) 1173, 1175 (1939).

44. Goddard v. Grand Trunk Ry., 57 Me. 202, 224 (1869).

45. 2 Johns Ch. 371 (N. Y. 1817).

46. *Ibid.* at 389. See Pound's discussion of the visitatorial power in (1936) 49 Harv. L. Rev. 369.

was the cause[47] of the passage by the state of New York, in 1829, of statutes[48] which, because of their adoption by other states, including Missouri,[49] have exerted considerable influence on modern corporation law. Among other clauses it is therein provided that "any creditor"[50] may invoke the jurisdiction of the circuit court for the purpose of taking various remedial steps against the directors of manufacturing and business corporations. This statute was the subject of judicial construction in the recent case of *Yellow Manufacturing Acceptance Corp. v. American Taxicabs*,[51] wherein simple nonjudgment creditors of a corporation sought to obtain a judgment against the directors for money and property allegedly transferred or wasted by them.

The relation between a director of a corporation and one of the simple creditors thereof is not difficult to define. There is no privity whatever.[52] Of course, if the director has committed an individual tort against some creditor, the latter has his remedy, just as any injured person under such circumstances.[53] Such cases have occasionally arisen involving a misrepresentation to the creditor by means of published statements of the corporation.[54] Except for cases of this type, however, it is commonly held that the individual creditor cannot, without the aid of statute, recover from the directors of the corporation even in event of such waste or diversion of the corporation's assets by the directors that the claim of the creditor cannot

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47. The "Report of the Commissioners Appointed to Revise the Statute Laws of this State", in Ch. 8, Title IV, Art. 2, footnote to #33 states: "The preceding section (similar to MO. REV. STAT. (1929) § 4959) is drawn to supply what are conceived to be important defects in some cases, and to remove doubts entertained respecting the power of the court in others. The first subdivision is intended, in connection with #35, to give the court of chancery in this state, the same power that is exercised by that court in England in cases of charitable corporations, and in other cases; the possession of which power is doubted by Ch. Kent, in 2 J. C. R. 384, although alleged to be a part of the general jurisdiction of the court in 2 Term Rep. 199. . . ."

48. 2 R. S. 462, #33, 34, and 35 (N. Y. 1829).

49. MO. REV. STAT. (1929) §§ 4959-4961, adopted in 1877, are substantially in the form of the original New York statute, although not identical therewith. See also MICH. COMP. LAWS (1929) §§ 15328, 15329, and 15330.

50. MO. REV. STAT. (1929) § 4961.

51. 344 Mo. 1200, 130 S. W. (2d) 601 (1939).

52. The common view was well expressed by Engerud, J., in the leading case of Hart v. Hanson, 14 N. D. 570, 575, 105 N. W. 942, 943 (1905), in the following words: "Creditors of the corporations are utter strangers to the obligations of the directors to the corporation." See also Union National Bank v. Hill, 148 Mo. 380, 49 S. W. 1012 (1899). A minority view, severely criticized by many courts, is that under the "trust fund doctrine" the directors are fiduciaries for individual creditors. See Comment (1936) 34 MICH. L. REV. 521.

53. Ashby v. Peters, 128 Neb. 338, 258 N. W. 639 (1935).

54. *Id.*

be liquidated.[55] The duty of the director, it is said, is owed to the corporation itself, not to the creditors thereof.[56] If, however, the creditor reduces his claim to judgment[57] and thereafter seeks the aid of a court of equity by means of a creditor's bill to reach the alleged claim of the corporation against the directors, it has been held that the action will lie.[58]

The statute involved in the instant case, however, speaks broadly of "any" creditor.[59] Does this mean that all bars are down? That any simple contract creditor may now, by virtue of the statute, institute at will actions in the circuit court directly against the managing officers of the corporation to bring them to account? It would doubtless be within the competence of the legislature to enact such a statute, but whether or not they have done so is a vital question and one upon which the court was called to rule in the principal case.

As opposed to such broad and literal construction, the traditional view as to the status of a creditor of a corporation may be stressed, namely, that his only right is to have his debt paid.[60] We may also argue against such construction that it could not have been the intent of the legislature in enacting this statute to subject corporate directors to the harassment that a literal construction might seem to warrant. It is not surprising, then, that two courts, Michigan,[61] and a lower court of New York,[62] have both squarely held, in construing substantially similar statutes, that the words "any creditor" should be interpreted to read "any *judgment* creditor."

Such a construction, however, results in a radical change in the class of individuals protected by the statute. And, to utilize an argument frequently employed in statutory interpretation, we might say that if the legislature had meant judgment creditor it would have been easy to have said so. Possibly a consideration of the origin of the statute may throw some light upon its meaning. Chancellor Kent, it will be recalled,[63] had

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55. Ready v. Smith, 170 Mo. 163, 70 S. W. 484 (1902). The same is held as to a mere general creditor seeking to set aside a fraudulent conveyance: Daggs v. McDermott, 327 Mo. 73, 34 S. W. (2d) 46 (1931); Davidson v. Dockery, 179 Mo. 687, 78 S. W. 624 (1904). As to the distinction noted in certain of the cases between acts of misfeasance and those of nonfeasance, see Darling & Co. v. Fry, 24 S. W. (2d) 622, 724 (Mo. App. 1930).

56. See Union National Bank v. Hill, 148 Mo. 380, 49 S. W. 1012 (1899).

57. Relating to the necessity for judgment, see (1939) 4 Mo. L. REV. 327.

58. The matter is thoroughly discussed in Buckley v. Maupin, 344 Mo. 193, 125 S. W. (2d) 820 (1939).

59. MO. REV. STAT. (1929) § 4961.

60. Brandeis, J., in Pusey & Jones Co. v. Hanssen, 261 U. S. 491, 497 (1923).

61. McKee v. City Garbage Co., 140 Mich. 497, 103 N. W. 906 (1905).

62. Steele v. Isman, 164 App. Div. 146, 149 N. Y. Supp. 488 (1914).

63. Note 46, *supra*.

suggested some doubt as to the jurisdiction of a court of chancery to supervise the conduct of corporations, and it was to avoid possible difficulties arising from his opinion that the statute was enacted.[64] In other words, it was not primarily remedial as to creditors: it was not enacted principally nor even secondarily for the purpose of supplying in equity a creditor's remedy desirable and necessary because of the law's inadequacy. The purpose was to enlarge the power of the court with respect to its supervision of corporations.[65] Considered in that light, the interpolation of the word "any *judgment* creditor" becomes an interpolation of questionable validity.[66]

It does not follow, however, from the conclusion that the statute may be invoked by any creditor, that it may be so invoked by such creditor at his whim and caprice, as was apparently feared by the New York court in the *Steele* case.[67] As was pointed out by Judge Otis in the case of *Hutson v. Long Bell Lumber Co.*,[68] before a creditor can complain and seek the intervention of the court, he must have been injured, *i. e.*, his rights must have been affected,[69] as, for instance, by the wrongful transfer of the assets of an insolvent corporation. Thus construed, we neither subject the corporation's officers to the abuse feared by the New York court, nor are we forced to read into the statute the requirement of judgment which arguably was not contemplated by the framers thereof. It is, of course, perfectly consistent with the interpretation here suggested on the basis of the history of the statute, that the court's jurisdiction under the statute be invoked only by those with a proper interest.

In the *Yellow Manufacturing* case,[70] the court clearly distinguishes

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64. Report of Commissioners, note 47, *supra*.

65. Vann, J., in People v. Ballard, 134 N. Y. 269, 286 (1892). In this regard the following extract from the opinion (not officially reported) of Peckham, J., upon the same point is of considerable interest (published as a footnote in the opinion of Vann, J., *supra*, p. 278): "It seems to me the plain language of the note by the revisers means to authorize the Court of Chancery to exercise, in regard to corporations created within this state, the same power which is exercised by that court in England in cases of charitable as well as other corporations, and that the language of the statute does, as matter of fact, clothe the court with the powers therein enumerated, and provides that they may be exercised in all such cases at the instance of the attorney-general as well as of a creditor or director."

66. Assuming, of course, that the purposes of the New York and Missouri legislatures were similar in enacting the statutes in question. Their marked similarity, together with the weight accorded the opinions of Chancellor Kent, suggest such conclusion.

67. Steele v. Isman, 164 App. Div. 146, 149 N. Y. Supp. 488 (1914).

68. 1 F. Supp. 468 (W. D. Mo. 1932), *aff'd sub nom*, Carson v. Long-Bell Lumber Corp., 73 F. (2d) 397 (C. C. A. 8th, 1934), *cert. denied*, 294 U. S. 707 (1934), *rehearing denied*, 294 U. S. 731 (1935).

69. 1 F. Supp. 468, 474 (W. D. Mo. 1932).

70. 344 Mo. 1200, 130 S. W. (2d) 601 (1939).

between the ordinary judgment creditor's bill in which the creditor's claim must have been reduced to judgment (if possible), and an action based upon the statute here under consideration. In spite of the long-standing authority to the contrary,[71] the decision that simple contract creditors may invoke the jurisdiction of the court, is, it is felt, entirely sound and in accordance with the underlying theory of the statute involved.

V. VENUE

In the case of *State ex rel. Henning v. Williams*,[72] the court was faced with one of the most baffling questions of modern jurisprudence, namely, "where *is* a corporation?"[73] Where does it "reside?" The problem is not unlike that of asking where a thought "resides." We do, for certain purposes, treat a corporation as if it were a person, just as admiralty law at times treats a ship as if it were a person,[74] but this constant, although not invariable,[75] process of thought is dangerous. As soon as the legal mind accepts as a fact that the corporation *is* a person, traveling as a person from one state to another, though having its "residence," just as a person, in the state of *X*—just at that point of complete personification, some strong decisions are likely to appear. Thus in *Peoples Pleasure Park Co. v. Rohleder*,[76] we find it decided that a corporation composed wholly of negro stockholders did not violate a covenant providing that "title to this land (is) never to vest in a person or persons of African descent" because, in effect, the corporate person has no color. One may be permitted to ask, with all deference to the court, how it is possible to establish the race or descent of a corporation, or, for that matter, of any other thought or idea? The hard truth of the matter is that we are using the word "corporation" as a shorthand symbol for a much longer phrase describing[77] a group of beings who are associated together for the purpose of conducting a certain business (or plan, or venture, not necessarily profit-making), with a pool of capital contributed by the members of the group, with the power to acquire and convey

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71. See notes 45 and 46, *supra*.
72. 131 S. W. (2d) 561 (Mo. 1939).
73. The phrase is that used by Cohen in his penetrating article, *Transcendental Nonsense and the Functional Approach* (1935) 35 COL. L. REV. 809.
74. The John G. Stevens, 170 U. S. 113 (1898).
75. The great number of exceptions to the entity rule (no insulation when the corporate form is used to evade a statute, perpetrate a fraud, defeat "public convenience", and so forth) may cast some doubt as to the actual acceptance, as a matter of practice, of the orthodox theory.
76. 109 Va. 439, 61 S. E. 794 (1908).
77. Not intended, of course, to be all-inclusive. See remarks of Finch, J., in People *ex rel.* Winchester v. Coleman, 133 N. Y. 279, 284, 31 N. E. 96 (1892).

property in their selected group name, and with the financial responsibility of each individual of the group limited by statute to his contribution to the pool. In shorter compass, a "corporation." Now let us suppose that this group borrows money as a unit upon the understanding not only fairly implied from the statute but specifically expressed that only the group, and not the members thereof, is to respond for repayment. The lender, however, upon maturity, prefers to seek his recovery from the wealthiest individual of the group. It is submitted that the plaintiff should fail in his action regardless of what this particular group is called. By hypothesis he knowingly lent his money to the group and not to the wealthy individual, and he must make his first attempt to seek repayment from that same group, regardless of what later remedies he may have by way of creditor's bill or otherwise. No fair-minded person objects to this result. Clothe the decision, now, in corporate language—the wealthy individual is a "stockholder" and it is well known that a stockholder is not liable for the debts of the corporation. The court will state further that it will not pierce the corporate veil to reach the stockholder behind, and, it will continue, since the corporation is the person who borrowed the money, the corporation is the person who must repay.

We have achieved the same result with either explanation. In neither does the individual have to respond. The difference is that in the latter decision we have, to explain the individual's non-liability, stressed the fact that the corporation is a "person." And, of course, if it is a person, questions as to its color and race and residence are sure to arise. It would seem a much more reasonable solution in the *Peoples Pleasure Park* case to have said that for *this* purpose (*i. e.*, for the purpose of interpreting the restrictive covenant) we will not forget that human beings compose the group and in them we are here primarily interested,[78] admitting, of course, that if the same group had borrowed money, we would *not* look for repayment primarily to the individuals composing the group. "Corporation," it is submitted, does not mean a "thing" but is a shorthand description of a way of doing business.[79] Briefly, a corporation is merely a method of doing business—the corporate method.

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78. Compare with the People's Pleasure Park v. Rohleder, the case of Frick v. Webb, 281 Fed. 407 (N. D. Calif. 1922), in which the ownership by a "subject of the emperor of Japan" of stock in a domestic corporation which in turn owned land in California was held to be an interest in real property and hence violative of the California Alien Land Law of 1920.

79. "The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought, is itself a fiction, and has been appropriately described as a figure of speech. It serves very well to designate

Where, now, does this corporation "reside?" The general rule is well established. A corporation's residence is in the state of its incorporation.[80] But we no sooner make such a statement than we have to change it to meet the next succeeding fact situation, which is always the case when we employ fictions in order to personify mental processes. Thus: a foreign corporation argues that it need not register its automobiles in a given jurisdiction because the statute merely says that all residents shall register their cars, and, continues the corporation, it is well established that we are a resident only of the state of our incorporation. The court replies, of course, that for this particular purpose it is also a resident of the jurisdiction in question.[81] Have we really been concerned with a question of "residence" at all? The real question before the court was whether or not the cars of that business unit, operated over the highways of the state, should be amenable to its laws regarding registration of automobiles. As to this there is only one answer. Or, this question may arise—shall a domesticated foreign corporation be suable in the same general manner as a corporation of our own state? Why not? It is an integral part of the business structure of the state and no reason suggests itself why it should normally have or claim preferential treatment. Yet, if it is a "non-resident" of the state the plaintiff may have more difficulty in establishing his venue than if such were not the case.[82] This was the problem before the court in the *Henning* case[83] in which the court decided that for purposes of venue, in the case at bar, a domesticated foreign corporation resided in the city and county of St. Louis where it maintained an office and place of business. The court, faced with a practical problem, gave a realistic answer. The phrasing of the decision in terms of "residence" followed from the statutory employment of the same terms, but the problem, it is submitted, is not basically one of "residence." To talk of the "residence" of a "corporation" is to pile one fiction on another.[84] Here, as in the automobile registration case,[85] the real question was one of control over foreign corporations.

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in our minds the collective action and agency of many individuals as permitted by the law; and the substantial inquiry always is what, in a given case, has been that collective action and agency." Finch, J., in People v. North River Sugar Refining Co., 121 N. Y. 582, 621, 24 N. E. 834, 839 (1890).

80. 8 FLETCHER, CYCLOPEDIA OF CORPORATIONS (Perm. ed. 1931) § 4025.
81. Gondek v. Cudahy Packing Co., 233 Mass. 105, 123 N. E. 398 (1919).
82. Note provisions of MO. REV. STAT. (1929) § 720.
83. 131 S. W. (2d) 561 (Mo. 1939).
84. See Goodwin v. New York, N. H. & H. R. Co., 124 Fed. 358, 370 (C. C. D. Mass. 1903).
85. See text keyed to note 81, *supra*.

Similarly, in the case involving the corporation's borrowing of money,[86] the real question was whether or not the group which borrowed as a unit should have to repay as a unit. This is answered by saying it must, because the corporation is the borrowing "person." It does no harm to use these fictions of "person" and "residence" provided we constantly bear in mind that they are in fact the baldest fictions. The next step, however, is to overlook that vital point—and rules as to the color, or race, of this corporate person. If it is in fact a person it is not absurd, certainly, to give it race or color. But is it a person? Or is the fact of the matter merely that we treat the group, for certain purposes, as if it were one?

CRIMINAL LAW

LATNEY BARNES*

During the year 1939 the Missouri Supreme Court handed down fifty-three decisions involving violations of the state's criminal statutes. One represented an unsuccessful appeal by the state from a judgment sustaining a demurrer to an indictment,[1] one was limited to a denial of its jurisdiction to decide the appeal,[2] one made absolute a preliminary rule of prohibition and prevented a circuit court from taking jurisdiction by *certiorari* over a proceeding against a justice and a constable who had seized "gambling devices" by illegal search and seizure and who were about to conduct a hearing to determine whether the devices were "gambling devices" which should be destroyed,[3] one was a *habeas corpus* proceeding by a defendant properly convicted of assault with intent to rob but in whose case the judgment, sentence and committment were for robbery in the first degree,[4]

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86. See text keyed to note 77, *supra.*

*Attorney, Mexico. LLB., University of Missouri, 1935.

1. State v. Green, 344 Mo. 985, 130 S. W. (2d) 475 (1939), holding that "laundry service is not an 'article of commerce' or 'article of convenience bought and sold' within Section 8701 of Missouri Revised Statutes, 1929, penalizing creation or participation in an agreement to regulate, control or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience or repair . . . or any 'article' or thing of any class or kind bought and sold."

2. State v. Sanderson, 124 S. W. (2d) 1071 (Mo. 1939).

3. State *ex rel.* McDonald v. Frankenhoff, 344 Mo. 188, 125 S. W. (2d) 816 (1939).

4. LaGore v. Ramsey, 126 S. W. (2d) 1153 (Mo. 1939). The court very properly refused to release, but remanded him to the custody of the sheriff of the county of his conviction (Jackson) that the court having jurisdiction over felony cases might pass the proper sentence in accordance with the verdict, to be effective from the date of his original conviction, in accordance with Section 1468 of Missouri Revised Statutes, 1939.

and one was a judgment that the state might recover the full $2000 penalty of a bond given under the provisions of the Liquor Control Act by one holding a five per cent liquor license, and who had sold one drink of whiskey in violation of the Act, without proving that the state was damaged by the principal's breach of the bond in making the sale.[5] The remaining forty-eight cases represent appeals from convictions — an average of less than one-half a case per county throughout the state.[6] In thirty of these cases the convictions were affirmed. Eighteen were reversed and remanded or reversed outright. Thus one would conclude that a defendant has about one chance in three of successfully maintaining an appeal.

Taken as a whole, the criminal cases decided during the year make interesting reading, for while many are "mine run" insofar as the principles of law involved are concerned, their application to novel and modern situations and conditions and the exceptions made to the old rules present and encouraging growth and development in this branch of the law.

I. JURISDICTION

A. *Of the supreme court on appeal*

In *State v. Sanderson,*[7] an appeal from a conviction of a Bus and Truck Law violation, raising an issue as to whether the legislature intended to enact retrospective law, was held to present only a question of *construction* of the statutes involved and not of *constitutionality,* and jurisdiction of the appeal was placed in the courts of appeal rather than in the supreme court.

B. *Of the circuit courts*

In *State v. Bailey,*[8] the defendant was charged in Shannon County, in the 20th Judicial Circuit, for statutory rape committed there. The defendant filed an application to disqualify the circuit judge, Hon. Will H. D. Green, on account of bias and prejudice, and also for a change of venue from Shannon County on account of the prejudice of the inhabitants of that county, but did not swear against the inhabitants of the other counties

5. State v. Wipke, 133 S. W. (2d) 354 (Mo. 1939).
6. In 1927 the court decided 164 criminal cases; in 1928, 113; in 1929, 95. The average for the ten year period, 1927-1936, was 89.2. See Hyde, *The Work of the Missouri Supreme Court for the Year 1938 (Court Organization)* (1939) 4 Mo. L. REV. 348.
7. 124 S. W. (2d) 1071 (Mo. 1939).
8. 344 Mo. 322, 126 S. W. (2d) 224 (1939).

in the 20th Judicial Circuit. The application for disqualification of the judge was erroneously denied, but that for change of venue was granted and the cause sent to Howell County in the same circuit. The defendant there contended that upon the filing of the application the court had been rendered incompetent and had no jurisdiction to enter the order changing the venue to Howell County, in consequence of which the circuit court of the latter county acquired no jurisdiction. This plea was overruled and after various proceedings, including the trial of the cause (wherein the jury failed to agree and a mistrial was declared), Judge Green reconsidered, sustained the plea to the jurisdiction, and ordered the cause certified back to Shannon County. There Judge Green entered an order reciting the foregoing history, set aside his order granting the change of venue to Howell County, sustained the application to disqualify himself, and called in Judge Barton of the 19th Circuit as special judge. Judge Barton sustained the application for a change of venue and sent the case to Dent County in his own circuit, the 19th. Defendant then filed a plea challenging the jurisdiction of the Dent County Circuit Court on two grounds: (1) that Judge Green originally changed the venue of the cause from Shannon to Howell County, and was without jurisdiction to change it back to the former county; (2) that Judge Barton was not authorized to send the cause out of the 20th circuit in which it was originally filed.

The supreme court held the first ground untenable; and that since the defendant did not save his exceptions in the Shannon County Circuit Court, whence the change of venue was ordered, but raised the question for the first time after the transfer to Dent County by a plea to the jurisdiction, the second objection was not properly saved.[9]

II. Double Jeopardy

The theft of several articles of property belonging to different owners at the same time and from the same place constitutes, in law, but one offense; and where a defendant was convicted in Carter County of stealing four heifers in Oregon County and transporting them into Carter County, and pending an appeal was placed upon trial in Oregon County for having stolen another heifer at the same time and place, a motion by the defendant for declaration of a mistrial and for a continuance of the cause pending final

9. The point must be raised and saved in the court from which the change is being taken. State *ex rel.* Wolfner v. Harris, 312 Mo. 209, 278 S. W. 668 (1925).

determination of the appeal from the first trial should have been sustained; and the motion to dismiss, filed at the close of the second case on the theory that the defendant was placed in double jeopardy for the same offense, was timely.[10]

A defendant cannot, after the jury is sworn, ask for a continuance, and, when it is granted at his request or with his consent, thereafter upon another trial object that he is placed in double jeopardy. The very word *continuance* connotes a resumption at a later date. The right to object to former jeopardy may be waived, and the defendant does so waive by his request for a continuance.[11]

III. The Trial

A. *The jury*

In the trial of a murder case the jury may separate to the extent of sleeping in pairs in various rooms of a hotel, where the rooms are kept locked, the sheriff sleeps in the hall, and the evidence shows that there was no room in the town large enough to enable all of the jurors to sleep in one room, providing the state *affirmatively* shows that the jurors were not subject to improper influences.[12] The jurors may make affidavits to show that no one approached them, since such affidavits tend to uphold the verdict and not to contradict or destroy it.[13] But the general rule that jurors cannot impeach their own verdict was reaffirmed.[14]

Similarly, the court in *State v. Ferguson*,[15] held that in small cities a sensible and substantial compliance with the statutory mandate[16] that the jury be kept together is sufficient. The rulings seem to be reasonable and, in view of the safeguards set up by the court, to do no violence to the defendant's right to have the jury kept together.

A juror whose wife's cousin married a brother of the defendant is not an incompetent juror and is not related to the defendant.[17]

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10. State v. Bockman, 344 Mo. 80, 124 S. W. (2d) 1205 (1939).
11. State v. Reynolds, 131 S. W. (2d) 552 (Mo. 1939).
12. State v. Westmoreland, 126 S. W. (2d) 202 (Mo. 1939).
13. *Ibid.*
14. State v. Bailey, 344 Mo. 322, 126 S. W. (2d) 224 (1939); Jordan v. St. Joseph Ry., Light, Heat & Power Co., 335 Mo. 319, 73 S. W. (2d) 205, 210 (1934).
15. 133 S. W. (2d) 1023 (Mo. 1939).
16. Mo. Rev. Stat. (1929) § 3683.
17. State v. Carter, 131 S. W. (2d) 546 (Mo. 1939).

In *State v. Londe*,[18] a prosecution for bombing, it was held that the defendant was not shown to have been prejudiced by the trial court's refusal to permit inquiry of several veniremen, who testified on *voir dire* examination that they had formed an opinion as to defendant's guilt or innocence from newspaper articles, as to whether evidence would be required to remove such opinion, because it did not appear that the state did not peremptorily challenge such veniremen or that defendant was required to exhaust any of his peremptory challenges in removing such veniremen from the trial jury. This seems to be the usual rule,[19] but there is serious question whether it is not the better rule that a failure to challenge for cause should stand separate and independent from the exhaustion of defendant's peremptory challenges. It would certainly seem preferable, if the rule in the principal case is to obtain, to require the state to show affirmatively either that the objectionable veniremen were struck off by the state or that the defendant did not exhaust his peremptory challenges, rather than to place the burden on the defendant of showing that he was injured by the erroneous ruling of the court.

B. *Continuances*

It was not error to refuse a continuance asked because defendant's subpoena for a material witness, *issued* eleven days before the trial, had not been served, where the defendant's attorney had made no attempt to discover whether the sheriff had served the witness and where no diligence was shown in attempting to reach the witness.[20] The court properly distinguishes this situation from that in which the witness is *subpoenaed* but fails to appear.[21]

But the court, in *State v. Jackson*,[22] reversed a conviction of murder in the first degree on the ground that insufficient time was allowed counsel to prepare for a murder trial. Counsel had been appointed on Thursday prior to a trial set for the following Monday, and it further appeared that one of the counsel was attending his first term of court and the other was absent on other legal business for three days, preventing his conferring

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18. 132 S. W. (2d) 501 (Mo. 1939).
19. See State v. Davis, 237 Mo. 237, 240, 140 S. W. 902, 904 (1911); State v. Nevils, 330 Mo. 831, 839, 51 S. W. (2d) 47, 50 (1932); Parlon v. Wells, 322 Mo. 1001, 1012, 17 S. W. (2d) 528, 533 (1929).
20. See note 11, *supra*.
21. State v. Jasper, 324 Mo. 668, 24 S. W. (2d) 161 (1930).
22. 344 Mo. 1055, 130 S. W. (2d) 595 (1939).

with co-counsel. The overruling of a motion to continue the case for one week under such circumstances was an abuse of discretion by the trial court.

C. *The verdict*

A verdict finding the defendant "guilty as charged", and reading "we assess his punishment *by* $50 [without using the word "fine"] and sixty days in County Jail" (without using the word "imprisonment") was sufficiently clear to authorize the trial court to assess defendant's *punishment* at a *fine* of $50 and *imprisonment* in the county jail for a *term* of sixty days.[23] The court held that under section 3704 of Missouri Revised Statutes 1929, where the jury agree upon a verdict of guilty but fail to agree upon the punishment, or do not declare such punishment by their verdict, or where the jury finds a verdict of guilty and assesses an unauthorized punishment, the court shall assess the punishment and render judgment accordingly.

IV. Evidence

In a prosecution for manslaughter for the death of a passenger of the accused,[24] the evidence for the state showed that the defendant had been to two dancing resorts within a period of two hours, taking three drinks of whiskey at one and two drinks of whiskey and part of a bottle of 3.2% beer at the other. Defendant testified that the count was two and one and no beer. Evidence from a couple who had accompanied the defendant, elicited by the state, was that "you could tell by his eyes and actions that he had been drinking", "he was under the influence of intoxicating liquor but not drunk" and "not real drunk . . . but a little under the influence of liquor, and that his eyes were red and that he talked a little louder than usual"; and the sheriff who had seen the accused a few minutes before the accident opined that the accused "was under the influence of liquor".

Speed of the car was estimated by his companions as seventy miles an hour or more; by the defendant as from fifty to fifty-five. On a very slight curve the accused's car began to swerve (he had been driving properly

23. State v. Couch, 344 Mo. 78, 124 S. W. (2d) 1091 (1939); citing State v. McDonough, 232 Mo. 219, 134 S. W. 545 (1911) with approval. See also note 2, *supra*. See also State v. Couch, 130 S. W. (2d) 529 (Mo. 1939).

24. State v. Ruffin, 344 Mo. 301, 126 S. W. (2d) 218 (1939). Only one other similar case has been tried in Missouri. See State v. Scheufler, 285 S. W. 419 (Mo. 1926).

for some seven or eight miles just prior to the accident), skidded, lost two of its tires, rolled over three or four times in a space of 150 feet, and then lodged against a railroad embankment. Defendant testified he thought the swerving resulted "from the collapse of the right rear tire."

The court thought the car was going "at a fast but not at a dangerous speed. Otherwise, why did not the girls protest?" The conviction had before the jury was reversed by the supreme court on "procedural grounds" in this "close case" for failure of the judge to reprimand the prosecuting attorney for showing by question and answer—struck out by the trial court on objection by the defendant—that the accused had not attended the funeral of the deceased. Error was also found in permitting the state, after the accused had testified that he had "no intention of injury, hurting or killing" the deceased, to ask the defendant on cross-examination if he had not stated in a restaurant on the night of the homicide that "he guessed he had had a bad wreck for he 'had killed a damned girl' ", and when the defendant denied having made such statements, to produce evidence that he had.

A reading of the court's opinion would indicate that the reasons assigned for the reversal were errors fortunately found by it to dispose of a jury's verdict with which it did not agree. The opinion does not show that confidence, deference and respect so customarily given the jury who "had the witnesses before them." The opinion does violence by suggesting that the guilt or innocence of the crime should turn upon whether or not the accused's companions "protested." The court seemed to forget that the case was a criminal action "against the peace and dignity of the *State*", and not a disfavored guest-passenger civil action for damages.

An accomplice is a competent state's witness if he has not agreed to testify in a *particular manner,* notwithstanding he may have made an arrangement by which, if he turns state's evidence, he will not be prosecuted. Such fact goes to his *credibility* and not to his *competency,* and the agreement to "testify against" a defendant does not mean that the witness will testify in any particular manner other than to disclose his full knowledge touching the offense.[25] The interpretation of the words "testify against" seem most reasonable. The court wisely ruled that *State v. Miller,*[26] holding similar words to *disqualify* a witness, was "not authoritative" in this re-

25. State v. White, 126 S. W. (2d) 234 (Mo. 1939).
26. 100 Mo. 606, 13 S. W. 832, 838, 1051 (1890).

spect, that opinion not having received a carrying vote but a majority of the court merely having concurred in the result.

Possession of recently stolen property is not proof of guilt as a matter of law, but is sufficient to carry the question of guilt and defendant's explanation of his possession to the jury; but the identity of the property in the defendant's possession as that stolen must be clearly established, and such mere descriptions as "a red sow with black spots on her" and "that would weigh around 300 pounds" are insufficient on which alone to base a conviction.[27] The possession of recently stolen property will support an inference that the possessor was the thief,[28] and it was for the jury to determine the truthfulness of the defendant's explanation of his possession, even though his explanation be uncontradicted.

While a mere promise to do something in the future, even if fraudulently made, will not sustain a conviction of obtaining money by false pretenses, yet where accused made such representations of existing facts as that he was a doctor and his companion an eye specialist, the mere fact that he also promised the glasses would be delivered in a few days would not prevent his conviction, where that was not relied on by the state as one of the false pretenses made. And prosecutions for obtaining money by false pretenses are exceptions to the general rule that evidence of crimes other than the one for which the defendant is on trial is inadmissible. The intent of the accused to deceive is vital and evidence of similar false representations to others shortly before or after the representations for which the accused is on trial or admissible to show the accused's intent.[29]

In a robbery prosecution wherein two witnesses who testified at a preliminary hearing had been subsequently executed pursuant to death sentences, the transcript of the evidence of such witnesses at the preliminary hearing was admissible, and its admission did not violate the right of the defendant to face his accusers.[30]

In *State v. Robinson*,[31] the court held that where the accused tenders the factual issue of the bad character of the victim of his assault to substantiate his plea of self defense, he thereby tenders an issue involving his own character, having extended the scope of the inquiry beyond the *res*

27. State v. Lease, 124 S. W. (2d) 1084 (Mo. 1939).
28. State v. Nicoletti, 344 Mo. 86, 125 S. W. (2d) 33 (1939), citing State v. Dilley, 336 Mo. 75, 80, 76 S. W. (2d) 1085 (1934). To the same effect see also State v. Nichols, 130 S. W. (2d) 485 (Mo. 1939).
29. State v. Craft, 344 Mo. 269, 126 S. W. (2d) 177 (1939).
30. State v. Gregory, 344 Mo. 525, 127 S. W. (2d) 408 (1939).
31. 344 Mo. 1094, 130 S. W. (2d) 530 (1939).

gestae. And a defendant should have been allowed to show that his reputation for honesty and as a "law-abiding citizen" was good, in a charge of larceny, for the evidence would go to the existence of the particular trait involved.[32]

In a prosecution for manslaughter for performing an abortion, it is incumbent on the state to show affimatively that the abortion was not necessary to preserve the life of the mother or of the unborn child. It is not sufficient to show that the deceased appeared to be in good health and performing her usual household duties just before the operation, where it appeared that she had been afflicted for some time with pulmonary tuberculosis and there was no evidence whether a woman in her condition could or could not have gone through pregnancy and childbirth safely.[33]

V. Right of Officer in Effecting Arrest

In *State v. Ford,*[34] defendant, a city marshal, had been convicted of second degree murder for shooting and killing the deceased as the marshal undertook to arrest him for a misdemeanor, the deceased resisting the arrest and attempting to seize the officer's gun. The court reversed the conviction and remanded the case for new trial, citing much-overlooked section 3571 of Missouri Revised Statutes 1929, and held that homicide is justifiable not only when committed in attempting by lawful means to apprehend any person for any felony committed but also in effecting the arrest of a misdemeanant who flees or forcibly resists, for the officer may then "use all necessary means to effect the arrest." By this decision the court overturned the doctrines of *State v. McGehee,*[35] and *State v. Salts,*[36] and reinstated *State v. Dierberger.*[37] The court did not determine what its ruling would be in the case of an officer shooting a *fleeing* misdemeanant[38] but dealt only with the situation where there was forcible resistance.

VI. Instructions

Where a "reasonable doubt" instruction is given, it is not necessary to have a repetition of the phrase "beyond a reasonable doubt" in the

32. State v. Quinn, 344 Mo. 1072, 130 S. W. (2d) 511 (1939).
33. State v. Smith, 344 Mo. 1129, 130 S. W. (2d) 550 (1939).
34. 344 Mo. 1219, 130 S. W. (2d) 635 (1939), noted (1940) 5 Mo. L. Rev. 93.
35. 308 Mo. 560, 274 S. W. 70 (1925).
36. 331 Mo. 665, 56 S. W. (2d) 21 (1932).
37. 96 Mo. 666, 10 S. W. 168 (1888).
38. See State *ex rel.* Kaercher v. Roth, 330 Mo. 105, 49 S. W. (2d) 109 (1932), holding an officer civilly liable for shooting a misdemeanant while fleeing from arrest.

other instructions.[39] But it was error to refuse a correct instruction submitting the converse of the state's main instruction, unless freely and fully covered by other instructions, if defendant requests it, notwithstanding the fact that the state's main instruction concludes with the words, "and unless you so find, you will acquit" or words of similar import. The mere giving of the instruction: "If, upon a consideration of all the evidence, you have a reasonable doubt of defendant's guilt, you should acquit," is insufficient to cure the error. The defendant is entitled to have his defense submitted to the jury in a direct way by instruction.[40] Further, the instructions must be in such physical form that they are intelligible. See the court's scathing denunciation of one which it called "wholly unintelligible," "in the nature of a jig-saw puzzle", the case being reversed on account of a given instruction's "awkwardness of form and jumble of substance."[41]

In a prosecution for forcible rape, it was not error for the court to fail to give an instruction on the failure of the prosecutrix to make complaint at the first reasonable opportunity on the theory that the failure to do so would be inconsistent with defendant's guilt. To instruct in such a manner would be a comment on the evidence and would invade the province of the jury.[42]

EQUITY

ROBERT S. EASTIN*

The decisions of the supreme court in the field of equity during the past year display no startling or unusual features. In general, the court applied well-settled rules of equity jurisprudence to situations which legally and factually conform to the traditional types.

The field of equity covers so many different subjects and is related so intimately to so many phases of the law, that it is difficult to approximate any general conclusions of value. Personally, the most salient feature

39. State v. Westmoreland, 126 S. W. (2d) 202 (Mo. 1939).
40. State v. Quinn, 344 Mo. 1072, 130 S. W. (2d) 511 (1939).
41. State v. Ervin, 344 Mo. 1029, 130 S. W. (2d) 580 (1939).
42. State v. Palmer, 344 Mo. 1063, 130 S. W. (2d) 599 (1939), disapproving State v. Patrick, 107 Mo. 147, 17 S. W. 666 (1891), which in turn was overruled by State v. Marcks, 140 Mo. 656, 41 S. W. 973, 43 S. W. 1095 (1897).

*Attorney, Kansas City. LL.B., University of Missouri, 1931.

observed in a review of the cases is the large number of actions brought to set aside transfers of property, real and personal. Creditors' bills to set aside fraudulent conveyances; suits by wives or widows to set aside transfers as in fraud of their dower and marital rights; suits by defrauded grantors themselves—all appear very frequently in the reports. Time has not permitted a survey to determine whether this situation is unusual. Perhaps such a survey might be of value to ascertain whether or not any relation exists between the number of such suits and the economic troubles of recent years.

In a clear majority of the equity cases the decision is based almost entirely upon the facts. Of necessity such decisions cannot be reviewed here. Many other cases simply apply well-settled principles of law. Some of these cases may be referred to, but in general they must be passed with at best a slighting comment. The following cases appear to deserve a more extended treatment.

The power of an equity court to mould its relief and to give adequate protection to equitable interests in the light of changing circumstances is well illustrated in *Bates v. Dana*,[1] perhaps the most unusual case decided during the year. There *A* Bank had a mortgage on part of a tract of land while *B* had a mortgage on another part of the tract. In place of this lien, *B* agreed to take a second mortgage on the whole tract subject to a prior lien of $26,500 to *A*. Actually, *A* was given a first mortgage for $66,000. *B* threatened litigation when she discovered this fact. To settle the dispute and to induce *B* to extend the maturity of her mortgage, *A* agreed with *B* that should it become necessary for *A* to foreclose its mortgage and should *A* commence foreclosure while *B's* mortgage was unpaid, *A* would, at *B's* request, "take up by assignment to it" *B's* mortgage at the face amount plus accrued interest. This agreement was entered into in 1929 and at that time *A* was a going concern. Some time later *A* failed and was placed in the hands of the proper statutory receiver. The mortgage given to *A* having become in default, *A's* receiver brought this action to foreclose it, making *B* a party defendant. *B* filed a cross-bill claiming priority as to the proceeds of the sale of the property to the extent of her mortgage. The supreme court held that *B* should be given this relief. *A's* receiver argued that the contract mentioned was a mere personal covenant by *A*; that when *A* failed, *B* could have filed a claim against *A's* estate for the damages suffered by her for non-performance, but that it did not give *B* any greater rights under her

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[1] 133 S.W.(2d) 326 (Mo. 1939).

mortgage than she had previously—a second mortgage. The court held that the contract was more than a mere personal covenant; that it expressed a condition precedent to foreclosure and that foreclosure could not be had until and unless *B*'s mortgage was paid. While *A* could not be compelled to pay *B*'s mortgage because of its insolvency, still the court could protect *B*'s rights by subordinating *A*'s mortgage to *B*'s and by awarding to *B* priority in payment out of the purchase money on the foreclosure sale. Here, therefore, we find a case where the court, in order to protect *B*'s rights, treated and construed what was in form a personal covenant to buy *B*'s mortgage into a substantive right in the property covered by the mortgage.

Also presenting rather unusual features are the somewhat parallel cases of *Smith v. Holdoway Construction Co.*[2] and *Merz v. Tower Grove Bank & Trust Co.*[3] Both involve the problem of how far a court will go in setting aside a transaction where the plaintiff is the wife or widow of the grantor and where it is found that the transaction is in fraud of her dower or marital rights. In each of these cases the court did not content itself with setting aside the transaction as it affected the interests of the plaintiff, but went further and set aside the whole transaction even though this tended to the benefit of the husband or the husband's heirs or distributees, the husband being, of course, a party to the fraudulent transfer. The court recognized that in general a fraudulent grantor or his heirs and distributees may not attack a transfer because it was in fraud of the marital rights of the grantor's wife—an elementary application of the clean hands doctrine—but stressed special circumstances in each of the cases which made the equities of the fraudulent grantor superior to those of the grantee. In the *Smith* case these superior equities arose out of the acts of the grantee subsequent to the transfer in placing a large mortgage on the property and appropriating the proceeds. This mortgage was given to a *bona fide* taker and so could not be set aside. Here also the court stressed the fact that in view of the presence of the large mortgage on the property, the wife's inchoate dower interest was of little value and could be cut off by default in the mortgage and subsequent foreclosure unless the equity should be in friendly hands. The husband and wife had become reconciled, and with the title in the name of the husband, the wife's equity could be protected. In the *Merz* case the special equities arose out of the fact that the grantee,

2. 344 Mo. 862, 129 S. W. (2d) 894 (1939).
3. 344 Mo. 1150, 130 S. W. (2d) 611 (1939).

a trust company acting as trustee under an *inter vivos* trust indenture, had induced the establishment of the trust by representations to the settlor, who apparently had no independent legal advice, that the trust could not be successfully attacked by his widow although the court found that the trust company should have known better.

In spite of what appears to have been a very determined attack by counsel, the court in *Buckley v. Maupin*,[4] adhered to the familiar doctrine that a creditor's bill to set aside a fraudulent conveyance can be brought only after the plaintiff has reduced his claim to judgment and execution has been returned *nulla bona*. The court noted that certain special circumstances might excuse compliance with the letter of this rule, but held that insolvency of the debtor was not such a special circumstance. The reasons for this position adduced by the court were entirely for the protection of the debtor—basically that he should not be deprived of his right to a trial by jury on a legal claim. In *Yellow Manufacturing Acceptance Corp. v. American Taxicabs, Inc.*,[5] however, an action brought under Section 4959, *et seq.*, Revised Statutes, 1929, the court held that a judgment at law was not a condition precedent to relief at the suit of a creditor. This statutory action is essentially an action against the directors of a debtor corporation who have aided or consented to a fraudulent conveyance. This action is not a creditor's bill but is based solely upon statute and the two cases may, therefore, be easily distinguished. However, the thought occurs that there is no real difference. In each instance a creditor is seeking secondary relief—in the first instance against a fraudulent grantee, in the second instance against the directors of a corporate debtor—because of fraudulent conveyances by the debtor. If the requirement of a jury trial as between debtor and creditor prevents the filing of a creditor's bill until a judgment has been obtained, it would seem that the same requirement would necessitate obtaining a judgment before pursuing the directors of the debtor. There is ample basis in history for the decision in *Buckley v. Maupin*, but it may be that the historical doctrine should be re-scrutinized. If the interests of the debtor do not require a jury trial as a condition precedent to a statutory action against the directors, should they do so in the case of a creditor's bill? It may be that they do not.

In the field of specific performance the chief interest lies in cases brought to enforce alleged oral contracts of adoption and to devise or be-

4. 344 Mo. 193, 125 S. W. (2d) 820 (1939).
5. 344 Mo. 1200, 130 S. W. (2d) 601 (1939).

queath property. In *Thompson v. Moseley*,[6] the court held that an oral contract to adopt would not be enforced where the adopted child was of age at the time of the contract. In this opinion the court recognized that such contracts have been enforced at the suit of persons who were minors at the time of the contract. However, the court definitely felt that these cases should be regarded with very close scrutiny as they offer a fertile field for fraud. Consequently, the right of recovery should be restricted to persons who were infants at the time that the contract was entered into, largely because the adopted child under such circumstances has little or nothing to say about the matter and frequently renders valuable services to the adoptive parent extending over a long period of time in the thought or under the impression that he or she in fact has been adopted. Such considerations do not apply where the adopted child is of age. While it may be difficult to justify the distinction on logical grounds, as a practical matter the distinction seems eminently sound.

In at least two cases of the same sort where the plaintiffs were minors when the contract was made, the court refused to enforce the alleged contracts because the proof of their existence did not come up to that clear and convincing standard required.[7]

Such oral contracts are not, however, universally rejected as appears from *Ver Standig v. St. Louis Union Trust Co.*[8] In this case an oral contract to devise realty was enforced and this notwithstanding a decision of the trial court in favor of the defendant. The court, however, was careful to point out that these contracts are enforced only when the proof of the contract is clear and convincing and when the failure to so enforce the contract will work an equitable fraud on the plaintiff. Another interesting problem presented in this case should be noted. At the time the contract was entered into the testator was unmarried. Later she married. Her husband survived her and elected to reject her will and take his statutory one-half subject to debts. There was no evidence that at the time of the marriage or at the time of his election the husband knew of the existence of the contract. The court, therefore, treated him as a *bona fide* taker and the plaintiff's claim was enforced only as to one-half of the property which was the subject matter of the contract. This serves to draw attention to

6. 344 Mo. 240, 125 S. W. (2d) 860 (1939).
7. Keller v. Lewis County, 134 S. W. (2d) 48 (Mo. 1939); Taylor v. Hamrick, 134 S. W. (2d) 52 (Mo. 1939).
8. 344 Mo. 880, 129 S. W. (2d) 905 (1939).

the fact that a person may take as a *bona fide* purchaser although he does not come within the ordinary concept of the term.

The following cases perhaps deserve a line or two.

In *Boatmen's National Bank v. Wurdeman*,[9] it was held that a deed of trust was properly set aside at the suit of the executor of the grantor on the ground that it was against public policy, having been given in part consideration of the dismissal by the informant of a proceeding to determine the grantor's sanity. Such proceedings are not adversary and the informant may not discontinue the same for a consideration.

In *Cordia v. Matthes*,[10] it was held that a sale under a deed of trust would not be set aside at the behest of the owner of the equity of redemption solely on the ground of inadequacy of price where the plaintiff had announced at the sale that any purchaser was buying a law suit and thus chilled the bidding.

A taxpayer in a drainage district was held to be barred by laches from complaining of the expenditure of money on certain works on the ground that they were not within the district's plan of drainage where such plan of drainage had been departed from more than twenty years past to the knowledge of the plaintiff.[11]

Naslund v. Moon Motor Car Co.,[12] will be of interest to all receivers and their counsel. It well demonstrates what a receiver should not do. An entirely honest man became involved and suffered substantial losses because of his undue optimism and his failure to take necessary precautions. While his errors were too numerous to mention, the most grievous one (financially) was the payment of claims as preferred upon *ex parte* orders of the receivership court. The supreme court held that these orders did not protect the receiver because entered *ex parte* and without notice to interested parties.

The decision a few years ago in *Haugh v. Bokern*,[13] that equity has no jurisdiction to construe a will solely to determine the legal title to lands passing thereunder (because of the adequacy of the legal remedy) was restricted to that particular situation in *Masterson v. Masterson*,[14] where equitable jurisdiction was upheld where personal property was involved

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9. 344 Mo. 573, 127 S. W. (2d) 438 (1939).
10. 344 Mo. 1059, 130 S. W. (2d) 597 (1939).
11. Graves v. Little Tarkio Drainage Dist. No. 1, 134 S. W. (2d) 70 (Mo. 1939).
12. 134 S. W. (2d) 102 (Mo. 1939).
13. 325 Mo. 1143, 30 S. W. (2d) 47 (1930).
14. 344 Mo. 1188, 130 S. W (2d) 629 (1939).

and where the plaintiffs (who claimed a remainder interest under the will) asked protection against waste and the like.

There have been many assertions that a divorce action is not an action in equity, and some holdings that it is specifically an action at law. A great deal of the confusion has been cleared up by the decision of the supreme court in *State ex rel. Couplin v. Hostetter.*[15] There the court held that while a divorce action is *sui generis,* nevertheless the divorce court has all of the powers of a court of equity in framing and enforcing its decree, especially when dealing with alimony, child support, and the like. As a result, a modification of an alimony decree granted upon terms was upheld.

In *Liberty Mutual Insurance Co. v. Jones,*[16] plaintiffs sought a declaratory judgment and defendants filed an equitable cross-bill thereto praying injunctive relief. The trial court took the view that the cross-bill had the effect of eliminating the declaratory judgment feature of the case, but the supreme court held that notwithstanding the cross-bill, the trial court should have entered a judgment declaring the parties' rights. Presumably, if the rights as declared warranted equitable relief in favor of defendants, the court could also give such relief.

In *Ross Construction Co. v. Chiles,*[17] it was held that an appeal by the plaintiff in an action in the nature of a bill of interpleader from an order refusing to require the defendants to interplead, was premature. Due to the continued interest of the plaintiff in the action, it was held that only the final judgment was appealable. Incidentally, in reaching this result the court wrote a rather lengthy and elaborate discussion of bills of interpleader, bills in the nature of bills of interpleader, their attributes and characteristics.

Many other cases of interest could be mentioned but considerations of space forbid. None present any particularly new feature of importance.

On the whole, therefore, it can be said that 1939 was a typical year in the field of equity, with an interesting but familiar group of cases. The law did not remain static but showed signs of sturdy growth. Perhaps a less hesitant attitude toward the more flexible remedies offered by equity may be desired, but on the whole, no serious criticism can be leveled at the court for failing to utilize all equitable remedies sought by the litigants.

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15. 344 Mo. 770, 129 S. W. (2d) 1 (1939).
16. 344 Mo. 932, 130 S. W. (2d) 945 (1939).
17. 344 Mo. 1084, 130 S. W. (2d) 524 (1939).

EVIDENCE

J. A. WALDEN*

The cases on evidence decided by the supreme court in 1939 do not break much new ground, but are concerned mainly with the application of established rules to the facts involved. If in some cases the reader considers that this review has been unduly burdened by a recitation of cases applying recognized principles, our justification will lie in the importance to the trial lawyer of having the rules of evidence constantly at his fingers' tips.

I. JUDICIAL NOTICE

In two cases the supreme court reiterates the well-established rule that it takes judicial notice of its own records;[1] in *State ex rel. Gaines v. Canada*,[2] the supreme court took judicial notice of an amendment of certain statutes; and in *Brown v. Citizens' State Bank*,[3] judicial notice was taken that under the laws of this state the property and business of a corporation is controlled and managed by its board of directors. In *Stark v. Berger*,[4] judicial notice was taken of the fact that some perceptible space of time must elapse between the realization of danger by an engineer and the setting of the brakes; and in *State v. Wymore*,[5] the court judicially noticed that private persons rarely file complaints in criminal cases with the circuit clerk or with the prosecuting attorney.

II. PRESUMPTION, INFERENCE, AND BURDEN OF PROOF

In *Snowwhite v. Metropolitan Life Insurance Co.*,[6] the court stated that the fact that an insurance agent collected a premium on his debit two hours after the accident in issue, raised no presumption that he was on company business at the time of the accident. This is an application of the established rule that while proof of a condition or situation at a prior time, not too remote, raises a presumption of its continued existence thereafter

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*Attorney, Moberly. A. B., University of Missouri, 1917, LL.B., 1920.

1. State *ex rel.* Horton v. Bourke, 344 Mo. 826, 129 S. W. (2d) 866 (1939); Ross Construction Co. v. Chiles, 344 Mo. 1084, 130 S. W. (2d) 524 (1939).
2. 344 Mo. 1238, 131 S. W. (2d) 217 (1939).
3. 134 S. W. (2d) 116 (Mo. 1939).
4. 344 Mo. 170, 125 S. W. (2d) 870 (1939).
5. 132 S. W. (2d) 979 (Mo. 1939).
6. 344 Mo. 705, 127 S. W. (2d) 718 (1939).

until the contrary is shown, nevertheless, such presumptions are not retroactive and do not run backward.

In a disbarment proceeding, the failure of respondent to call as a witness a person charged to have been employed by him as his solicitor, raised no unfavorable inference against respondent, where respondent had not admitted and the evidence did not establish that such person was actually a solicitor for respondent, and where such person attended the hearing under subpoena from informants;[7] but, in *Tichenor v. Bowman*,[8] it was held that failure to produce relevant documentary evidence under control of a party raised an inference that such evidence, if produced, would have been unfavorable to the party.

In *Conrad v. Diehl*,[9] it was re-affirmed that where real estate is carried in the name of straw parties with the intent and purpose to conceal the true ownership, an inference of fraud arises.

In *Wills v. Berberich's Delivery Co.*,[10] the court, in an illuminating opinion, re-examines the ever-troublesome rule against piling inference upon inference. The claimant, in a compensation proceeding, contended that the deceased died of septecemia which spread from a boil, and that the spreading was induced by an injury to deceased's shoulder received in the course and scope of his employment. The defendant vigorously contended that the causal connection between the shoulder injury and the spread of the septecemia from the boil could only be established by piling inference on inference. The opinion establishes new limitations upon the rule, and says that the true doctrine is that the rule against piling inference on inference is not a general rule applicable to all situations, but is a rule of reason governing only when the proven facts and their reasonable implications furnish no basis for agreement or disagreement by persons of average intelligence as to whether the *factum probandum* has been established. The case of *Cardinale v. Kemp*[11] is not overruled by the opinion, but is limited to conform to the true doctrine as above stated. The strength of the relation between the factual premise and the conclusion is the all-important test, even though one or more inferences may intervene, and the rule prohibiting the piling of inferences is said to be intended to guard against attenuated reasoning, as where an initial inference is drawn from fact and other infer-

7. *In re* Parkinson, 344 Mo. 715, 128 S. W. (2d) 1023 (1939).
8. 133 S. W. (2d) 324 (Mo. 1939).
9. 344 Mo. 811, 129 S. W. (2d) 870 (1939).
10. 134 S. W. (2d) 125 (Mo. 1939).
11. 309 Mo. 241, 276, 274 S. W. 437, 448 (1925).

ences are built solely and cumulatively on the first so that the conclusion reached is too remote and has no sound logical foundation in fact. But it is noted that there is no inflexible rule to cover the logical processes involved. Logic, and not law, furnishes the test of relevancy, so that the real question is whether the conclusion hypothesized can fairly be drawn from proven facts by reasonably intelligent minds. Under the opinion, a result reached by piling inference upon inference is not *per se* unsound, and the rule against the piling of inferences is relegated to the status of a test of relevancy and of the logical processes involved in reaching a conclusion sought to be established.

III. Admissions and Declarations

An offer of compromise is not admissible as an admission against interest,[12] but statements and admissions made before any dispute took place or after an attempted compromise had been abandoned, and admissions which by their very nature negative compromise, are not within the rule which prohibits the introduction of an offer of compromise.[13]

The statement or former testimony of one not a party to the action cannot be introduced on the theory that it is an admission against interest;[14] and in *Schroeder v. Rawlings*,[15] it was ruled that to make a statement of the defendant in an automobile accident suit that he had liability insurance admissible as against his interest, the statement must be relevant and material to some issue involved.

Admissions against interest may be contained in proofs of loss and in receipts furnished insurance companies, and where such admissions are uncontradicted, they are sufficient to place the burden upon the insured to disprove the facts so admitted.[16]

In *Reiling v. Russell*,[17] the rule is re-stated that admissions may be by acts as well as by words, and the fraudulent conduct of a party to litigation in a prior suit, from which can logically be inferred the belief in the existence or non-existence of some fact in issue in a subsequent suit, is admissible as against his interest. Where a plaintiff has been paid compensation by his employer's insurer, his failure to file a compensation claim for

12. Schneider v. Dubinsky Realty Co., 344 Mo. 654, 127 S. W. (2d) 691 (1939).
13. Jacobs v. Danciger, 344 Mo. 1042, 130 S. W. (2d) 588 (1939).
14. Collins v. Leahy, 344 Mo. 250, 125 S. W. (2d) 874 (1939).
15. 344 Mo. 630, 127 S. W. (2d) 678 (1939).
16. Langan v. United States Life Ins. Co., 344 Mo. 989, 130 S. W. (2d) 479 (1939).
17. 134 S. W. (2d) 33 (Mo. 1939).

two months after compensation payments were stopped could not be an admission on plaintiff's part, in an action against a third party, that his disability terminated at the time payments were stopped.

IV. Parol and Extrinsic Evidence Affecting Writings

In *White v. Kentling*,[18] a clause in a deed provided, "in case this land is not used for the purpose of a bank and this corporation passes out of existence said property is to revert to grantors." This clause was held not ambiguous, and was subject to construction by the trial court in a quiet title suit, and oral testimony as to circumstances surrounding the writing of the deed and insertion of the clause were inadmissible.

V. Opinion Evidence

In *State v. Ruffin*,[19] the testimony of the occupants of an automobile as to its speed was admitted *ex necessitate* for what it was worth, although they said they were not qualified judges as to speed; and in *State v. Evans*,[20] defendant's witnesses, although allowed, upon the circumstances detailed, to testify that in their opinion defendant was of unsound mind, were not permitted to state that defendant did not know right from wrong, since such an opinion would have invaded the province of the jury.

Where an issue arises as to whether claimant's disability arose from causes for which the defendant would be liable, and where the evidence does not exclude all other causes, and a layman could not know or have any reasonable basis for an inference as to the cause of the disability, the opinion of a doctor that a certain occurrence or condition might, could or would produce a certain result, is not alone substantial evidence that such an occurrence or condition did produce the result.[21]

But in *Wills v. Berberich's Delivery Co.*, the court held that experts might give their opinion as to which of two or more possible causes more probably produced the injury, and further, that physicians may express an opinion upon the causal connection between the injury and result, where such opinion is based on facts testified to by physicians treating the injured person.

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18. 134 S. W. (2d) 39 (Mo. 1939).
19. 344 Mo. 301, 126 S. W. (2d) 218 (1939).
20. 133 S. W. (2d) 389 (Mo. 1939).
21. Hunt v. Armour & Co., 136 S. W. (2d) 312 (Mo. 1939).

VI. Weight and Sufficiency of Evidence

In two cases the court reaffirms its rule that a very clear case is required for a holding that positive corroborated testimony is untrue, because of physical impossibility.[22]

In *Tichenor v. Bowman*, casual remarks made thirty years before the trial with respect to certain deeds, were of slight probative value in a suit to establish an implied trust.

In *Lappin v. Prebe*,[23] it is stated that while the facts necessary to sustain a recovery in a civil case may be proven by circumstantial evidence, nevertheless, the facts and circumstances proven must be such that the facts necessary to support the verdict may be inferred, and must reasonably follow, and such circumstantial evidence must exclude guess-work, conjecture and speculation as to the existence of necessary facts, and a case based upon an inference or inferences must fail, upon proof of undisputed facts incompetent with such inferences.

VII. Witnesses

A. *Competency*

In *Taylor v. Hamrick*,[24] plaintiff sought to enforce an alleged oral contract to adopt her, made between plaintiff's father and her deceased stepmother. To such a contract the father was a competent witness.

In a suit to adjudge title and partition real estate, one claiming under a deceased party who would have been a competent witness if living, is not disqualified by the death of the one under whom he claims.[25]

Where a witness is disqualified by the death of a party, the disqualification is waived if his adversary first introduces testimony on the subject, given by the disqualified witness in another trial.[26]

B. *Examination*

In *First National Bank v. Vogt*,[27] it was error to restrict too much the cross-examination as to the circumstances, where it was contended, in a suit

22. Melenson v. Howell, 344 Mo. 1137, 130 S. W. (2d) 555 (1939); Branson v. Abernathy Furniture Co., 344 Mo. 1171, 130 S. W. (2d) 562 (1939).
23. 131 S. W. (2d) 511 (Mo. 1939).
24. 134 S. W. (2d) 52 (Mo. 1939).
25. Fullerton v. Fullerton, 132 S. W. (2d) 966 (Mo. 1939).
26. *In re* Franz Estate, 344 Mo. 510, 127 S. W. (2d) 401 (1939).
27. 344 Mo. 284, 126 S. W. (2d) 199 (1939).

by creditors to set aside a conveyance by a father to a daughter as fraudulent, that the deed was executed in payment of antecedent indebtedness.

In *Schroeder v. Rawlings*, under the guise of cross-examination, it was sought to develop testimony which would reveal to the jury that the defendant was protected by liability insurance, and the rule was declared that cross-examination cannot be used to develop improper matter, nor excused upon the ground that it is to lay a basis for impeachment, since incompetent and irrelevant matter cannot come in under the guise of impeachment.

In *State v. Privett*,[28] witnesses offered by defendant to prove his general reputation as a quiet, peaceable and law-abiding citizen may be cross-examined as to their knowledge of defendant's activities, inconsistent with such reputation.

In *Schipper v. Brashear Truck Co.*,[29] it was held that the extent to which an unfriendly witness, or a person whose interest is adverse, may be examined, is a matter within the sound discretion of a trial court, and the appellate court will not interfere with the exercise of such discretion in the absence of abuse thereof.

C. *Credibility, impeachment and corroboration*

Where the character of the prosecutrix in a rape case had been attacked by testimony as to specific instances of unchastity and lewdness, rebuttal testimony showing prosecutrix' good reputation for morality and chastity was admissible, and it was permissible to ask a witness on cross-examination whether he was not a deserter from a C. C. Camp, since such fact tended to discredit the witness.[30]

A defendant testifying as a witness in his own behalf cannot be impeached by proof of the mere charge of an offense.[31]

In *Flint v. Loew's St. Louis Realty & Amusement Corp.*,[32] a statement in writing, made by the plaintiff at the time she fell on defendant's steps, in which she said she did not know the cause of her fall, was admissible to impeach her, after she had testified on trial to facts which she said caused her fall.

In the case of *State v. Robinson*,[33] the court indicates a new situation, wherein defendant's reputation for the specific traits of character involved

28. 344 Mo. 1020, 130 S. W. (2d) 575 (1939).
29. 132 S. W. (2d) 993 (Mo. 1939).
30. State v. Daugherty, 126 S. W. (2d) 237 (Mo. 1939).
31. State v. Spinks, 344 Mo. 105, 125 S. W. (2d) 60 (1939).
32. 344 Mo. 310, 126 S. W. (2d) 193 (1939).
33. 344 Mo. 1094, 130 S. W. (2d) 530 (1939).

in a homicide case may be considered in issue. The trial was one for murder, with a plea of self-defense. Error was assigned because the state introduced evidence of the accused's reputation as a quarrelsome, turbulent and violent man, contending that the accused had tendered no such issue, and that only his reputation for truth and veracity was in issue. The opinion points out that the defendant, by cross-examination of the state's witnesses and by direct evidence offered by him, had sought to prove the bad reputation of deceased as a quarrelsome, turbulent and violent man. This, the court says, was a tender by the defendant of the factual issue as to the bad character of his victim, to sustain his plea of self-defense, and it is ruled that thereby defendant extended the scope of the inquiry beyond the *res gestae*, and opened up for inquiry all evidence of like quality and probative value on the merits of the ultimate factual issue, and held that the state was not limited, under such circumstances, solely to such evidence as would impeach the defendant as a witness. The decision obviously will change the course to be followed by defense attorneys in many future criminal trials.

VIII. Relevancy and Res Gestae

In *Schroeder v. Rawlings*, it was sought to justify the admission of defendant, made shortly after the accident, that he had liability insurance, upon the ground of *res gestae*, and that same constituted an admission of liability. In holding such evidence inadmissible as *res gestae*, the court states the rule to be that *res gestae* relates to and authorizes the reception in evidence of matter incidental to the main fact and explanatory of it, but that it is confined to acts and words which are so clearly connected therewith as to constitute a part of the transaction, and without knowledge of which the main fact might not be properly understood.

Concerning the admission of what is sometimes designated real evidence, the court held that in a second degree murder case where there was an issue of self-defense, deceased's shirt was properly admissible for the purpose of showing the location of the wound he received, so that the jury might determine who was the aggressor;[34] that a revolver taken by defendant at the time of a robbery is admissible in evidence;[35] and that in a burglary and larceny case, cartridges found on the ground outside of the burglarized store were admissible when similar cartridges were found on the defendant.[36]

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34. State v. Westmoreland, 126 S. W. (2d) 202 (Mo. 1939).
35. State v. Gregory, 344 Mo. 525, 127 S. W. (2d) 408 (1939).
36. State v. Pease, 133 S. W. (2d) 409 (Mo. 1939).

In *State v. Wymore,* it was held that evidence of the notoriety of an existing fact is admissible to prove knowledge on the part of another of such fact.

IX. Criminal Law

A. *Acts and declarations of co-conspirators and co-defendants*

The testimony of an accomplice may be used by the state, even though the accomplice has been promised immunity, provided he has not promised to testify in a particular way in consideration of immunity.[37]

B. *Admissions and confessions*

In *State v. Craft,*[38] a constable was allowed to testify as to when he received the warrant for defendant's arrest, and as to his inability to find defendant, on the theory that the whereabouts of a defendant after the commission of a crime are always admissible; and in *State v. Murphy,*[39] the entire conversation at the time defendant was arrested was admissible, and it was not error to ask the witness if the defendant at the time stated where he was on the day of the robbery, to which the witness replied in the negative.

A written statement given by the defendant while under arrest and before he was represented by counsel, and when he had not been advised that the statement might be used against him, was, nevertheless, admissible against him, where it did appear that the statement was voluntary.[40]

C. *Proof of other offenses*

In *State v. Spinks,*[41] the rule is re-affirmed that the state cannot prove against a defendant any crime not alleged either as a foundation for a separate punishment or as aiding the proof that he is guilty of the offense charged, even though he has put his character in issue, except that evidence of other crimes is competent to prove the specific crime when such evidence tends to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme embracing the commission of two or more crimes so related to each other that proof of one tends to establish the

37. State v. White, 126 S. W. (2d) 234 (Mo. 1939).
38. 344 Mo. 269, 126 S. W. (2d) 177 (1939).
39. 133 S. W. (2d) 398 (Mo. 1939).
40. State v. Evans, 133 S. W. (2d) 389 (Mo. 1939).
41. 344 Mo. 105, 125 S. W. (2d) 60 (1939).

proof of the others or the identity of the person charged with the commission of the crime on trial. Proof merely that the defendant is charged with or has committed another crime is not admissible to impeach him, even after he has testified as a witness in his own behalf.[42] And in *State v. Craft*,[43] it is held that in a criminal charge of obtaining money or property under false pretenses, evidence of similar transactions in which the accused participated is generally admissible, under the exceptions hereinabove set out, so that the conduct of the accused and his statements to others, admittedly defrauded, are relevant to establish his guilt under the charge being tried.

D. *Evidence at preliminary or former trial*

In *State v. Gregory*,[44] it was held that where two witnesses who had testified at the preliminary were dead, the transcript of their testimony taken at the preliminary could be used at the trial, and it was not necessary to produce the testimony of the stenographer at the preliminary, who at the time of trial was in South America, to identify the transcript, where the justice of the peace before whom the preliminary was held, and the prosecuting attorney who acted at the preliminary, identified the exhibit purporting to be the transcript of the evidence taken at the preliminary.

EXTRAORDINARY LEGAL REMEDIES

RUSH H. LIMBAUGH*

I. CERTIORARI

A. *Statistics*

During 1939 the Missouri Supreme Court decided or finally disposed of twenty-six cases in which writs of *certiorari* had been issued. In each of these cases the court reviewed a decision by one of the courts of appeals. Eleven of these cases were decided by Division One of the court, six by Division Two of the court, and nine by the court *en banc*. Of the cases reviewed, fourteen were decisions of the Kansas City Court of Appeals,

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42. *Ibid.*
43. 344 Mo. 269, 126 S. W. (2d) 177 (1939).
44. 344 Mo. 525, 127 S. W. (2d) 408 (1939).

*Attorney, Cape Girardeau. A.B., University of Missouri, 1916. Author of PLEADING, PRACTICE, PROCEDURE AND FORMS IN MISSOURI (1937).

nine were decisions of the St. Louis Court of Appeals, and three were decisions of the Springfield Court of Appeals. In fourteen of the cases reviewed, the opinion of the court of appeals was quashed, either in whole or in part. In twelve of the cases reviewed, the writ or *certiorari* was quashed. During the year the court did not exercise its function of reviewing decisions of other inferior courts.[1]

B. *Purpose of writ as applied to courts of appeals*

In *State ex rel. Missouri-Kansas-Texas R. R. v. Shain,*[2] *State ex rel. Mills v. Allen,*[3] *State ex rel. Pemberton v. Shain,*[4] and *State ex rel. Banks v. Hostetter,*[5] the court restated the general rule that the purpose of *certiorari* to review opinions of the courts of appeals was to secure uniformity in judicial decisions and preserve harmony in the law.

C. *The question of conflict*

In *State ex rel. Kansas City Public Service Co. v. Shain,*[6] the court adhered to the general rule that on *certiorari* to review an opinion of a court of appeals, its function is to determine whether the opinion of the court of appeals conflicted with the last previous ruling of the supreme court, either as to a general principle of law announced or as to a ruling under a like, analogous or similar state of facts. The rule was re-announced in the same language in *State ex rel. Melbourne Hotel Co. v. Hostetter.*[7] In *State ex rel. Gentry v. Hostetter,*[8] the court declined to consider a question of error raised in the opinion of the court of appeals, because on *certiorari* the supreme court is concerned only with the question of conflict. Likewise, in *State ex rel. Waters v. Hostetter,*[9] the court repeated that on *certiorari* it was concerned only with questions of conflict on the particular issues decided by the court of appeals. And in *State ex rel. United Factories v. Hostetter,*[10] the court said that it would not quash an opinion of a court of appeals "unless it clearly appears that the ruling

1. Limbaugh, *The Work of the Missouri Supreme Court for the Year 1938 (Extraordinary Legal Remedies)* (1939) 4 Mo. L. REV. 389-391.
2. 343 Mo. 961, 124 S. W. (2d) 1141 (1939).
3. 344 Mo. 743, 128 S. W. (2d) 1040 (1939).
4. 344 Mo. 15, 124 S. W. (2d) 1087 (1939).
5. 344 Mo. 155, 125 S. W. (2d) 835 (1939).
6. 134 S. W. (2d) 58 (Mo. 1939).
7. 344 Mo. 472, 126 S. W. (2d) 1189 (1939).
8. 343 Mo. 1090, 125 S. W. (2d) 72 (1939).
9. 344 Mo. 443, 126 S. W. (2d) 1164 (1939).
10. 344 Mo. 386, 126 S. W. (2d) 1173 (1939).

of the court of appeals conflicts with, or contravenes, a controlling decision of this court ruling the point in question." In *State ex rel. St. Louis-San Francisco Ry. v. Shain*,[11] and *State ex rel. Massman Construction Co. v. Shain*,[12] the court pointed out that on *certiorari* the supreme court was concerned only with whether or not the opinion under review is in conflict with the last controlling decision of the supreme court on the points ruled.

D. *What constitutes conflict*

In an automobile collision case where plaintiff sought recovery under the humanitarian rule and primary negligence, and defendant sought recovery on a counterclaim on the same grounds, a ruling by the court of appeals approving an instruction that if defendant were driving on the right side of the road while exercising the highest degree of care, and was negligently struck by an automobile driven by plaintiff's employee, the defendant was entitled to recover, was held to be in conflict with prior decisions of the supreme court holding that an instruction directing a verdict on factual issues should submit pleaded and proved affirmative facts upon which predicated verdict is to be determined. This was held in *State ex rel. Grisham v. Allen*.[13]

In *State ex rel. Jefferson City v. Shain*,[14] plaintiff recovered judgment against the city for injuries resulting from a fall alleged to have been caused by a defective sidewalk. The court of appeals approved an instruction which authorized a verdict for plaintiff based on a mere defect in the sidewalk, whether dangerous or not. The supreme court held that such approved instruction amounted to a positive misdirection, because it did not require a finding that the defective condition rendered the sidewalk unsafe and dangerous to travelers, and the error in such instruction was not cured by the fact that other instructions submitted that question. Because the decision of the court of appeals approving such instruction conflicted with prior decisions announcing such principles, its opinion was quashed.

In *State ex rel. Baldwin v. Shain*,[15] it was held that a decision of of the court of appeals that the trial court could not say as a matter of

11. 134 S. W. (2d) 89 (Mo. 1939).
12. 344 Mo. 1003, 130 S. W. (2d) 491 (1939).
13. 344 Mo. 66, 124 S. W. (2d) 1080 (1939).
14. 344 Mo. 57, 124 S. W. (2d) 1194 (1939).
15. 125 S. W. (2d) 41 (Mo. 1938).

law, in a suit under the humanitarian doctrine for the death of a person struck by a train, that the defendant's failure to slacken the speed of the train was not a proximate cause of the death of the deceased, in view of the fact that the deceased, who was walking on ends of ties, would have had more time to step aside to a place of safety if speed had been slackened, conflicted with controlling decisions of the supreme court.

In *State ex rel. Banks v. Hostetter,* the court held that a decision by the court of appeals that an instruction submitting the question of slackening the speed of a truck, though there was no evidence to show that a collision would have been prevented by the slackening of speed, did not require reversal, was in conflict with prior decisions of the supreme court, where it was held prejudicial error to instruct the jury on the failure to slacken speed when there was no evidence that slackening would have prevented the collision.

In *State ex rel. Prudential Insurance Co. v. Shain,*[16] where the court of appeals had decided, in effect, that contracting typhoid fever through the normal consumption of contaminated water amounts to the suffering of bodily injuries from accidental means, so as to come within a provision of an insurance policy providing for double indemnity in case of accidental death, the supreme court held that in such decision the court of appeals construed language that had a plain and unambiguous meaning, contrary to prior decisions of the supreme court.

In *State ex rel. Mutual Life Insurance Co. v. Shain,*[17] it was held that where a court of appeals construes language of an insurance policy that is unambiguous, in order to reach its conclusion authorizing recovery under the policy, its decision construing the policy contrary to its plain meaning is in conflict with decisions of the supreme court and must be quashed.

In *State ex rel. Melbourne Hotel Co. v. Hostetter,* the supreme court quashed an opinion of a court of appeals remanding a cause based on a claim filed with the workmen's compensation commission, to the commission with an instruction as to the character of award to make, on the ground that the action of the court of appeals conflicted with decisions by the supreme court that a court, on reviewing an award made by the workmen's compensation commission, is not authorized under the law to make its own findings and direct the commission to confirm it.

16. 344 Mo. 623, 127 S. W. (2d) 675 (1939).
17. 344 Mo. 276, 126 S. W. (2d) 181 (1939).

In *State ex rel. Sterling v. Shain,*[18] where a court of appeals held that the setting aside of a default judgment at a subsequent term was discretionary, the supreme court held that such decision was in conflict with its prior decision and that such action must be based on evidence that is sufficient and substantial.

In *State ex rel. Henderson v. Shain,*[19] the supreme court held that a decision by a court of appeals permitting recovery on an implied contract although a specific contract had been alleged, was in conflict with prior decisions of the supreme court.

E. *What may be considered in determining question of conflict*

In *State ex rel. Pemberton v. Shain,* and in *State ex rel. St. Louis-San Francisco Ry. v. Shain,* the supreme court followed its established rule that on *certiorari* to review a decision of a court of appeals it is limited to a consideration only of the opinion of the court of appeals and such pleadings and documents as are referred to therein and made in part a basis of the decision.

In *State ex rel. Massman Construction Co. v. Shain* and *State ex rel. Henderson v. Shain,* it was held that the supreme court on *certiorari* will examine a motion referred to in a court of appeals opinion under review, as though the motion was set out in full in the opinion.

As previously indicated, a number of cases re-asserted the principle that the supreme court might not, on *certiorari,* consider the question of the correctness of the decision of the court of appeals on the merits of the case.

F. *What is binding on supreme court on certiorari*

In *State ex rel. Baldwin v. Shain,* and in *State ex rel. Kansas City Gas Co. v. Shain,*[20] the court said that on *certiorari* the court of appeals determines the facts and the supreme court is bound by the court of appeals' conclusion as to what the facts are.

In *State ex rel. Sterling v. Shain,* the court held that, generally, the question of whether evidence is sufficient and substantial is for the trial court and court of appeals in the determination of the case on its merits, and is not one for the supreme court to decide on *certiorari.*

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18. 344 Mo. 891, 129 S. W. (2d) 1048 (1939).
19. 344 Mo. 1003, 130 S. W. (2d) 491 (1939).
20. 132 S. W. (2d) 1015 (Mo. 1939).

State ex rel. Sterling v. Shain also held that in determining the question of conflict the supreme court is limited to facts stated in the opinion by the court of appeals.

On the other hand, in *State ex rel. Baldwin v. Shain,* the court repeated its rule formerly announced that, while it is bound by the conclusion of the court of appeals in the case under review as to what the facts are, it is not bound by the result the court of appeals reaches by applying the law to the facts. And in *State ex rel. Banks v. Hostetter,* the court said that it was not bound "by an expression of the court of appeals in its opinion as to what the result should be after the law is applied to the facts stated in the opinion where such result conflicts with a controlling decision of this court." Likewise, in *State ex rel. Sterling v. Shain,* the court held that, while a court of appeals as a matter of law passes on questions of substance, the supreme court on *certiorari* is not bound by a conclusion reached by a court of appeals in applying the law to the facts, where the supreme court has reached a different conclusion in applying the law to a similar state of facts.

Nor can a court of appeals prevent *certiorari* by declaring that the facts it sets out in its opinion are not similar to those in decision by the supreme court, for, as said in *State ex rel. Banks v. Hostetter,* if the supreme court should be bound by such a declaration by a court of appeals, it "would be completely disarmed and unable to preserve harmony in our judicial decisions."

G. *What supreme court cannot do on certiorari*

In *State ex rel. Melbourne Hotel Co. v. Hostetter,* the supreme court said that it could not on *certiorari* describe the bounds of the court of appeals' analysis, nor control the form or content of their expression of the facts.

The supreme court cannot on *certiorari* examine *de novo* the evidence as shown by the record of the case submitted to the court of appeals, as the supreme court is limited in its consideration to what the evidence of the case is as such evidence is stated in the opinion of the court of appeals. This was held in *State ex rel. Sterling v. Shain.*

In *State ex rel. Massman Construction Co. v. Shain* and *State ex rel. Henderson v. Shain,* it was held that contentions not decided by the court of appeals are not considered by the supreme court on *certiorari.*

These same two cases also held that on *certiorari* the supreme court will not decide conflicts between opinions of courts of appeals.

When a court of appeals says in its opinion that it concludes that the evidence of the case does not justify a ruling that plaintiff was guilty of contributory negligence as a matter of law but does not state the evidence on which it bases that conclusion, the supreme court cannot determine whether or not the decision is in conflict with its prior decisions. This was held in *State ex rel. Kansas City Gas Co. v. Shain.* This is one way by which a court of appeals can shut the door against a review of its decision by *certiorari.*

H. *What supreme court can do on certiorari*

Under the constitution, the supreme court has exclusive jurisdiction to determine appeals in cases where the title to real estate is involved. On an appeal in a will contest where the will devised real estate, the supreme court has held that it had exclusive jurisdiction.[21] In *State ex rel. Pemberton v. Shain,* where the Kansas City Court of Appeals, decided an appeal of a case to set aside a will which devised real estate, the supreme court on *certiorari* quashed the opinion of the court of appeals and retained the decision on its merits.

Where a court of appeals' decision correctly stated the law on a given proposition, although it was in conflict with a prior decision of the supreme court, it was held in *State ex rel. Mills v. Allen* that in considering the proposition anew on *certiorari,* where the supreme court finds its former decision on the point was wrong, it would overrule its former decision and quash the writ of *certiorari.*

II. Habeas Corpus

In *LaGore v. Ramsey,*[22] petitioner was tried and convicted on an indictment charging him with assault with intent to rob. He was sentenced to the penitentiary for robbery in the first degree. The court held, on the prisoner's petition for *habeas corpus,* that the judgment, sentence and commitment were void but that he not be discharged but released from the penitentiary to the marshal of the supreme court and by him delivered to the sheriff of the county where he was convicted,

21. Proffer v. Proffer, 342 Mo. 184, 114 S. W. (2d) 1035 (1938).
22. 126 S. W. (2d) 1153 (Mo. 1939).

to be taken before the judge of the circuit court where he was convicted, and that the judge sentence him on the charge on which he was convicted.

In *Reardon v. Frace*,[23] petitioner was held under a judgment of a court of appeals that he had unlawfully engaged in the practice of the law and for that reason was guilty of contempt of court. The petitioner claimed he was unlawfully restrained under a warrant of commitment void because no facts were stated authorizing the restraint. The applicable statute[24] provides that when a person is committed for any contempt specified by the statute "the particular circumstances of his offense shall be set forth in the order or warrant of commitment." The statute does not mention unlawful practice of the law as an offense for which there shall be a commitment. But the statute is declaratory of the common law, and under both the warrant was void, and the petitioner was ordered discharged.

III. Mandamus

In *State ex rel. Garhart v. Smith*,[25] *mandamus* was sought against the state auditor to compel him to register a township bond. The point raised was that the first date of publication of the notice of the bond election was not twenty-one days prior to the date of the election, as the statute[26] required. The court issued the peremptory writ, holding the newspaper containing the notice of the bond election as first published, which was placed in the hands of readers twenty-one days before the election, furnished statutory notice, even though it contained a date twenty days prior to the election.

In *State ex rel. Springfield v. Smith*,[27] *mandamus* was used to compel the state auditor to register a series of City of Springfield bonds. The question involved was, whether statutes pertaining to cities of the second class prescribing notice applied, or whether a statute applicable to all cities governed the notice. The court laid down the proper rule of statutory construction, found the sections of the statutes applicable to cities of the second class applied, and held that proper notice had been given and that the bonds should be registered.

In *State ex rel. Horton v. Bourke*,[28] the *mandamus* writ was first

23. 344 Mo. 448, 126 S. W. (2d) 1167 (1939).
24. Mo. Rev. Stat. (1929) § 1867.
25. 344 Mo. 213, 125 S. W. (2d) 832 (1939).
26. Mo. Rev. Stat. (1929) § 7961.
27. 344 Mo. 150, 125 S. W. (2d) 883 (1939).
28. 344 Mo. 826, 129 S. W. (2d) 866 (1939).

issued by a circuit court against the members of the state board of health to compel the board to annul an order revoking a license to practice medicine and surgery in the state and to issue relator a license or reinstate the license previously revoked. The alternative writ was made permanent by order of the circuit court and on appeal to the supreme court the judgment was reversed. Asserting that the writ of *mandamus* was a hard and fast and unreasoning writ, representing the right arm of the court and essentially the exponent of judicial power reserved only for extraordinary emergencies, and that it does not issue except in cases where the ministerial duty sought to be coerced is simple and definite, and that it does not lie where there is another adequate remedy, the supreme court held that the writ cannot be used to redress any wrong the board may have done in revoking the license of relator, and that relator's remedy was by suit in equity to set aside the order revoking his license.

In *State ex rel. School District No. 24 v. Neaf*,[29] the action originated in the supreme court to compel the assessment and taxation of mains, pipes, hydrants and appurtenances of a power plant as personal property in the district where they are located, under an amendment to a statute authorizing such assessment. The constitutionality of the amendment was urged. Pointing out that the function of the *mandamus* writ is to exclude and not adjudicate, to compel the performance of ministerial official duties when the right of such compulsion is not doubtful, and to meet the exigencies of extraordinary emergencies in matters of more than local concern, the court said it would even declare statutes unconstitutional in determining whether the writ should issue, where the statute was "clearly and obviously" unconstitutional, but it denied the peremptory writ on the ground that the question presented was only of local concern, and that the existence of an extraordinary emergency was not shown.

In *State ex rel. Gaines v. Canada*,[30] the supreme court reversed and remanded the cause in which relator used the writ of *mandamus* against the registrar and curators of the University of Missouri to compel them to admit him to the school of law of the University, in accordance with the mandate of the Supreme Court of the United States.[31]

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29. 344 Mo. 905, 130 S. W. (2d) 509 (1939).
30. 344 Mo. 1238, 131 S. W. (2d) 217 (1939).
31. For comment on the first decision of the case by the Supreme Court of Missouri and the decision of the case by the Supreme Court of the United States, see (1939) 4 Mo. L. REV. 400-401.

In *State ex rel. Eggers v. Brown,*[32] *mandamus* was sought against the secretary of state and the commissioner of motor vehicles and his deputy in charge of the St. Louis branch office, to compel them to furnish relator, who is in the business of publishing and selling lists of the registration of motor vehicles, certain records kept in the St. Louis office. The alternative writ was quashed, on the ground that the right to inspect and copy the records in the office of respondent is not an unlimited right but it is one that is subject to such reasonable regulations as may be imposed to prevent undue interference with the work of the employes of the office and to prevent undue interference with the public being served at the office.

IV. Prohibition

In each of the thirteen cases the supreme court decided in 1939 involving the extraordinary writ of prohibition, the writ was directed against a circuit judge. All of the cases but one originated in the supreme court. One of the cases was decided by Division One of the court, three by Division Two of the court, and the remainder by the court *en banc.*

In *State ex rel. Graves v. Southern,*[33] the prosecuting attorney of Jackson county applied unsuccessfully to have the writ used against a circuit judge who excluded the prosecuting attorney and the attorney general from the grand jury room.

In *State ex rel. McDonald v. Frankenhoff,*[34] the writ was used at the instance of a justice of the peace and constable to compel a circuit judge to desist from hearing a proceeding on a writ of *certiorari* to determine the legality of proceedings by the justice as to whether certain property were gambling devices. The case involves the question of illegal search and seizure. The preliminary rule was made absolute on the ground that the circuit court did not acquire jurisdiction to issue the writ of *certiorari* because of the lack of candor and fairness in failing to make full disclosure of the facts in his petition and because the petition disclosed that its purpose was to protect outlawed devices.

In *State ex rel. Riggs v. Seehorn,*[35] prohibition was used to prevent a circuit judge from exercising jurisdiction he announced that he intended

32. 134 S. W. (2d) 28 (Mo. 1939).
33. 344 Mo. 14, 124 S. W. (2d) 1176 (1939).
34. 344 Mo. 188, 125 S. W. (2d) 816 (1939).
35. 344 Mo. 186, 125 S. W. (2d) 851 (1939).

to assume over a trust estate, the jurisdiction over which had been already lodged in another division of the same circuit court.

In *State ex rel. Wilkerson v. Skinker*,[36] a probate judge sought by the use of the writ of prohibition to prevent a circuit judge from using the *mandamus* writ against the probate court to compel it to grant an appeal from a judgment of the restoration of relator to his right mind after he had been adjudicated insane. The question was whether an appeal lies from judgment under the statute.[37] The supreme court held that, even though the statute granting the right of appeal in such case caused hardship, it was the function of the court in prohibition not to determine the wisdom of the statute but to construe it, and since the statute gave the right of appeal the circuit court had the right to compel the probate court to abide by it.

In *State ex rel. National Refining Co. v. Seehorn*,[38] a suit was originally brought by a husband in circuit court for damages for the loss of the comfort, society and services of his wife and medical expenses incurred in her behalf, all caused by the alleged negligence of defendant. Before the case was tried, plaintiff died and the action was revived in the name of the administrator of his estate. The defendant demurred on the ground that the cause of action died with plaintiff and could not be maintained by the administrator. The court overruled the demurrer and required the defendant to answer and announced that the trial must proceed. The writ of prohibition was used to prevent further proceedings. The supreme court held that the cause of action of the husband did not survive him and could not be maintained by the administrator of his estate, and, since the trial court was about to act in excess of its jurisdiction, prohibition is the proper remedy.

In *State ex rel. Missouri Broadcasting Co. v. O'Malley*,[39] the writ of prohibition was used against a circuit judge who ordered the production for inspection of certain books and records for use in a case on trial. The question was whether the order violated constitutional provisions forbidding unreasonable searches and seizures. The supreme court held that the circuit court did not exceed its jurisdiction in making the order, and the provisional rule in prohibition was discharged.

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36. 344 Mo. 359, 126 S. W. (2d) 1156 (1939).
37. Mo. Rev. Stat. (1929) § 493.
38. 344 Mo. 547, 127 S. W. (2d) 418 (1939).
39. 344 Mo. 639, 127 S. W. (2d) 684 (1939).

In *State ex rel. Smith v. Joynt*,[40] the writ of prohibition was used to prevent a circuit judge from appointing a receiver for an alleged partnership in a case where the petition against the alleged partnership did not state a cause of action and facts showed the partnership did not exist. The court held that where a cause of action is not stated, there is no case pending and the court is without power to appoint a receiver.

In *State ex rel. Caulfield v. Sartorius*,[41] prohibition was used to prevent a circuit judge from enforcing an order removing relator as co-trustee, on the ground that the court was without jurisdiction. The supreme court held that the order of removal was not a final judgment from which an appeal lies, but was merely an incident in the administration of a trust, that for a court to have authority to remove a trustee there must be a clear necessity for it in order to save the trust property, and, since no such necessity was shown to exist, the court exceeded its jurisdiction in ordering the removal of the trustee, and prohibition lies to prevent the enforcement of the order.

State ex rel. Lee v. Sartorius[42] involved the administration of certain trust property as part of the trust under consideration in the last preceding case. Here the circuit court undertook to remove a committee representing certificate holders operating under an agreement. The supreme court held that the members of the committee were not subject to removal by the court, and prohibition would lie to prevent the court from acting beyond the scope of his powers.

In *State ex rel. First National Bank v. Sartorius*,[43] prohibition was used to prevent a circuit judge from appointing a successor-trustee to fill a vacancy caused by the removal of a trustee.

In *State ex rel. Robertson v. Sevier*,[44] the writ of prohibition was used on the relation of the superintendent of insurance of Missouri against a circuit judge to prohibit him from passing on a motion relative to the payment of funds derived from insurance rate reduction litigation.

V. Quo Warranto

There is little left unstated in the law of *quo warranto* in Missouri in the case of *State ex inf. McKittrick v. Wymore*,[45] where the writ was

40. 344 Mo. 686, 127 S. W. (2d) 708 (1939).
41. 344 Mo. 919, 130 S. W. (2d) 541 (1939).
42. 344 Mo. 912, 130 S. W. (2d) 547 (1939).
43. 344 Mo. 931, 130 S. W. (2d) 550 (1939).
44. 132 S. W. (2d) 961 (Mo. 1939).
45. 132 S. W. (2d) 979 (Mo. 1939).

used to oust a prosecuting attorney because of official misconduct. The court not only exercised its power under the writ to remove respondent from his office, but it also assessed a fine and taxed the costs of the action against him. The opinion of the court is classic and historic.

The writ was also used to oust from office the treasurer of St. Louis, in *State ex inf. McKittrick v. Dwyer.*[46] Respondent was appointed by the mayor of St. Louis upon the death of the regularly-elected treasurer. The court held that the mayor was without authority to make such appointment.

In *State ex rel. Springfield v. Springfield City Water Co.*,[47] a proceeding in the nature of *quo warranto* was instituted for the purpose of ousting the respondent from the streets and public thoroughfares of Springfield, on the alleged ground that respondent was occupying the streets illegally and without franchise. After discussing at length the legal effect of proceedings by Springfield in which the existence and rights of the respondent were recognized, the court held that the city was estopped to deny that respondent has a perpetual franchise. The right of ouster was denied.

In *State ex rel. Goodman v. Heath*,[48] a *quo warranto* proceeding originated in the circuit court on the information of a prosecuting attorney at the relation of an individual, to oust respondent from the office of school director, on the ground that he was not qualified to hold the office because he was not a resident taxpayer who had paid a state and county tax within one year next preceding his election and because he did not make a legal oath and qualify for the office within four days after his election. The circuit court denied ouster and quashed the writ. From this judgment relator appealed to the supreme court. The court discussed the statutes fixing the qualifications of the respondent and held that a person who owns taxable property and owes taxes on it which are due and payable during the calendar year preceding his election, is eligible to take the office of common school director if he pays such taxes at least prior to the time prescribed for taking his oath of office. The judgment of the circuit court was affirmed.

46. 343 Mo. 973, 124 S. W. (2d) 1173 (1939).
47. 131 S. W. (2d) 525 (Mo. 1939).
48. 132 S. W. (2d) 1001 (Mo. 1939).

THE HUMANITARIAN DOCTRINE

WILLIAM H. BECKER, JR.*

During the year 1939, the Missouri Supreme Court continued to use the phrase "humanitarian doctrine" to cover the well established last clear chance rule as well as the peculiar Missouri doctrine. And the cases determined in 1939 failed to shed any light upon the true nature of the Missouri humanitarian rule as distinguished from the last clear chance rule. It became increasingly evident, however, that the court would some day be confronted with the necessity of determining whether two equally oblivious automobile operators colliding at a street intersection may recover simultaneously against each other. Increasing use of the humanitarian rule as a defense or counter offense in automobile cases made it more likely that this question would be presented in a form which cannot be avoided.

In the meantime, the court is having more and more difficulty with instructions to juries in automobile cases which are not so simple as the classic grade-crossing train accident. This difficulty in trial practice is but a symptom of an underlying obscurity of principle. Until the court decides what the Missouri humanitarian doctrine is, there is going to be more than the usual difficulty in its administration. Until some satisfactory answer is found, the court will probably continue to avoid a showdown.

I. THE COURT EN BANC

Stark v. Berger[1] involved a truck-train grade crossing collision. The court reversed outright a judgment for the plaintiff, holding:

(1) That the engineer of a train had a right to assume that the truck driver would stop before entering the pathway of the train;

(2) That no duty arose under the humanitarian rule to stop the train or slacken its speed until the truck reached a point where it could not be stopped before entering the pathway of the train, (*i. e.*, the truck was not in the "zone of imminent peril" until it reached this point);

(3) That where, as in the case at bar, only two seconds elapsed from the time the duty to act arose and the time the collision occurred, there could

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*Attorney, Columbia. LL.B., University of Missouri, 1932.

1. 344 Mo. 170, 125 S.W.(2d) 870 (1939).

be no recovery for failure to stop or slacken (the truck driver was not oblivious, therefore failure to warn was not involved);

(4) That judicial notice will be taken of the fact that some time must elapse from the moment the engineer realizes the danger until the time the brakes can be set;

(5) That expert testimony of the *instantaneous* action of air brakes at the moment the lever is pushed into position will be disregarded in view of the judicial knowledge of the court and evidence of the various operations required to make the brakes effective.

The principles announced by the court seem to be well established. The result depended upon the court's construction of the effect of the evidence.

Judge Tipton dissented in the case without opinion, probably disagreeing with the court's construction of the evidence. This dissent, therefore, is of little significance because no disagreement in principle was announced, and because it was probably limited to the result of application of accepted principles to the facts.

In the case of *State ex rel. Banks v. Hostetter*,[2] a truck collided with the rear of an automobile parked partially on the pavement and partially on the shoulder at night. The case was submitted upon the humanitarian rule in an instruction hypothesizing failure to swerve or failure to slacken the speed of the truck. These grounds were submitted in the disjunctive.

The supreme court held that it was erroneous to submit slackening because there was no evidence that slackening would have prevented the collision. This error was held to require reversal of the judgment for the plaintiff. This was simply an application of the doctrine earlier applied several times in the railroad cases.

State ex rel. Banks v. Hostetter[3] is a companion case involving the identical question.

II. Division One

In *Branson v. Abernathy Furniture Co.*,[4] two automobiles travelling in opposite directions on the highway collided. The right front wheel of plaintiff's car went off the right side of the concrete slab onto a muddy shoulder. As the plaintiff pulled his car back onto the slab, it began

2. 344 Mo. 155, 125 S. W. (2d) 835 (1939).
3. 128 S. W. (2d) 1022 (Mo. 1939).
4. 344 Mo. 1171, 130 S. W. (2d) 562 (1939).

skidding. Thereafter defendant's car, without swerving or slackening, struck the plaintiff's skidding car which had come over onto the defendant's right hand side of the slab.

The court held that a submissible humanitarian case was made; that when the plaintiff's car began to skid toward the defendant's side of the road, the plaintiff was in imminent peril and the defendant had a duty under the humanitarian rule to act.

In passing upon the instruction, the court held that the plaintiff was not in a position of imminent peril when his car ran off the pavement onto the shoulder. The court held that the zone of peril is much narrower in cars approaching each other so as to pass without interference, and cases where the plaintiff and defendant are approaching at right angles so that their paths will eventually cross.

In the *Branson* case, the court restated the rule with respect to the requirements of a sole cause instruction. It pointed out that the requirements were different in a case submitted solely under the humanitarian doctrine and in a case submitted under both primary negligence and the humanitarian rule.

Mclenson v. Howell[5] involved an automobile collision. Plaintiff was making a left turn to reach a filling station located on the left side of the street on which she was travelling. She was struck by the defendant's oncoming car.

It was held that the case was submissible under the humanitarian rule for failure to stop and slacken. The principal instruction which imposed the duty to stop or slacken *after* plaintiff started turning left, was held proper as against the contention that it unduly extended the zone of imminent peril. The instruction required the jury to find the plaintiff in a position of "imminent and inescapable peril." In passing upon the instruction, the court pointed out that "inescapable peril" defined the situation where the plaintiff was helpless to avoid the collision by her own efforts, while "imminent peril" may comprehend the situation where the peril is caused by obliviousness, with ability in the plaintiff to extricate herself.

The principal instruction contained a concluding paragraph authorizing a verdict for the plaintiff even though the jury found the plaintiff

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5. 344 Mo. 1187, 130 S. W. (2d) 555 (1939).

guilty of negligence. The concluding clause was held proper and the case distinguished from the prior ruling in *Smithers v. Barker.*[6]

In the *Melenson* case, the defendant submitted a sole cause instruction and also set up a counterclaim. The plaintiff pleaded and submitted contributory negligence as a defense to this counterclaim. The submission of the counterclaim on primary negligence was held to be additional justification for the concluding paragraph of the plaintiff's principal instruction.

This case is another illustration of the complications in submitting a humanitarian case to the jury where the defendant files and submits a counterclaim.

In *Prater v. Rausch,*[7] defendant's car collided with the plaintiff's car which was crossing the street on which defendant's car was travelling. An instruction given on behalf of the defendant was held erroneous because it unduly limited the zone of imminent peril. The instruction contained the following clause:

> ". . . if you find and believe from the evidence that the automobile in which plaintiff was riding *was driven immediately in the path of defendant's automobile,* and in so close proximity thereto as to make it impossible for the defendant to prevent his automobile from colliding with the automobile in which plaintiff was riding, by the exercise of the highest degree of care in the operation thereof, then your verdict must be in favor of the defendant."

It was held by the court that this violated the rule of the cases holding the defendant not authorized to wait until the plaintiff's car is immediately in his path before taking steps to avert the collision. The giving of this instruction was held to be sufficient ground for the granting of a new trial by the supreme court.

In *Meese v. Thompson,*[8] the court again applied the rule that a humanitarian case cannot rest upon speculation and conjecture. The occurrence out of which the suit arose was a truck-train grade crossing collision. The evidence failed to show that action on the part of defendant after the plaintiff came into a position of imminent peril would have permitted the plaintiff to escape injury. The rule seems to be well established in cases of this kind that the evidence must positively show that slackening under the humanitarian rule would permit the plaintiff to pass out of danger.

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6. 341 Mo. 1017, 11 S. W. (2d) 47 (1937).
7. 344 Mo. 888, 129 S. W. (2d) 910, 911 (1939).
8. 344 Mo. 777, 129 S. W. (2d) 847 (1939).

In *State ex rel. Brosnahan v. Shain*,[9] the court held the "discoverable peril" feature of the humanitarian rule inapplicable where the occupier of premises in backing her car out of her own driveway, struck a trash man who came on the premises once a month. It was held that the practice of the trash man coming on the premises once a month was not the sort of user by the public which invokes the duty to keep a lookout at the point of user. Since there was no duty to keep a lookout, there could be no constructive notice of the plaintiff's presence such as would impose liability under the "discoverable peril" branch of the humanitarian doctrine.

In *Kick v. Franklin*,[10] an automobile-train grade crossing collision, the court severly criticized the instruction of the plaintiff for violation of the rule established in *Buehler v. Festus Mercantile Co.*[11]

The instruction contained the words "immediately coming into and were in a position of imminent peril and danger." But the phrase was used only in connection with the hypothesis of the actual situation and not in connection with the hypothesis upon which a duty to warn under the humanitarian rule was based. Under these circumstances, the Supreme Court of Missouri held that there was error but that it was not reversible error.[12]

In *Robinson v. Kansas City Public Service Co.*,[13] which involved the striking of a pedestrian by the overhang of a street car, the court held that it was not error to give an instruction concerning the right of the motorman to assume that the plaintiff would exercise ordinary care to avoid injury to herself. This ruling was justified on the ground that the principal instruction undertaking to submit humanitarian negligence mentioned some elements of primary negligence but did not submit primary negligence. It was held that the mention of a "sharply curved switch track" and that the rear end of the car "extended out dangerously beyond the rails" injected primary negligence into the case, sufficiently to admit consideration of contributory negligence.

The ruling is based upon an earlier decision and is interesting prin-

9. 344 Mo. 404, 126 S. W. (2d) 1193 (1939); Note (1939) 4 Mo. L. REV. 472.

10. 137 S. W. (2d) 512 (Mo. 1939).

11. 343 Mo. 139, 119 S. W. (2d) 961 (1938).

12. The Springfield Court of Appeals in Hank v. Anderson-Parks, 143 S. W. (2d) 314 (Mo. App. 1940), did not follow the Kick case in a practically identical situation.

13. 133 S. W. (2d) 548 (Mo. 1939).

cipally as an example of the hypertechnical reasoning involved in charging the jury under the humanitarian rule.

Reiling v. Russell[14] was the case of a pedestrian knocked down by an automobile while crossing a street. The case was submitted solely under the humanitarian rule and the defendant had a verdict of the jury. A sole cause instruction failing to contain the elements prescribed in *McGrath v. Meyers*,[15] was disapproved.

Collins v. Leahy[16] and *Conroy v. St. Joseph Ry., Light, Heat & Power Co.*[17] involved no notable ruling.

III. Division Two

State ex rel. Grisham v. Allen[18] was commented upon last year,[19] though it properly belongs in the work of the court for the year 1939.

This case shows that there has not yet been expressed a clear statement of the principle to be applied and the practice to be followed where plaintiff and defendant simultaneously invoked the humanitarian rule each against the other.

Clifford v. Pitcairn[20] involved no notable ruling.

INSURANCE

Orrin B. Evans*

I. Jurisdiction

A. *In general*

Most of the insurance in force in Missouri is written by, and most of the insurance company defendants in litigation in Missouri courts are, foreign corporations. The Missouri statute[1] authorizing service upon the

14. 134 S. W. (2d) 33 (Mo. 1939).
15. 341 Mo. 412, 107 S. W. (2d) 792 (1937).
16. 344 Mo. 250, 125 S. W. (2d) 874 (1939).
17. 134 S. W. (2d) 93 (Mo. 1939).
18. 344 Mo. 66, 124 S. W. (2d) 1080 (1939).
19. (1939) 4 Mo. L. Rev. 409.
20. 131 S. W. (2d) 508 (Mo. 1939).

*Assistant Professor of Law, University of Missouri. A.B., University of Wisconsin, 1931, LL.B., 1935; J.S.D., Yale University, 1940.

1. Mo. Rev. Stat. (1929) § 5894.

superintendent of insurance in certain suits against these non-resident insurers is, therefore, of great importance, and the precise limitations of its applicability have been much questioned. In *Fogle v. Equitable Life Assurance Soc.*,[2] the Springfield Court of Appeals held that such service was proper in a suit upon a policy of insurance issued by defendant New York corporation to a citizen of Louisiana upon the latter's own life and payable upon his death to another Louisiana citizen, which policy, after maturity, had been assigned to the present plaintiffs, citizens of Connecticut and Missouri. On *certiorari*, this decision was found to conflict with *State ex rel. Phoenix Mutual Life Ins. Co. v. Harris*,[3] and the opinion quashed.[4]

While the appeal was pending, the statute was changed by the legislature.[5]

B. *Of the supreme court*

Few cases are taken by the supreme court on *certiorari* in which lip service is not paid to the doctrine that the court may not consider the case on its merits but may only search for conflict with controlling prior decisions. Twice within the past year this principle was severely strained when the court held[6] that the courts of appeal had failed to give the "plain words" of insurance policies their "plain meaning," thus violating a fundamental tenet of insurance law. Of course, the particular language had never before been passed upon by the supreme court, but the court, in effect, so violently disagreed with the construction of the lower courts that it felt there was no room for "construction"; that by attempting "construction" (*i. e.*, by reading the language as they did) the courts of appeal flouted the supreme court rule that unambiguous language must be given its natural meaning. To be sure, that rule is a limitation on the frequently harsh habit of construing all insurance policies against the insurers, and in both cases the courts of appeal had found against the insurers, but it is hard to see in the supreme court decisions anything more

2. 123 S. W. (2d) 595 (Mo. 1938).

3. 343 Mo. 252, 121 S. W. (2d) 141 (1938), discussed in Evans, *The Work of the Missouri Supreme Court for the Year 1938* (*Insurance*) (1939) 4 Mo. L. REV. 410.

4. State *ex rel.* Equitable Life Assur. Soc. v. Allen, 136 S. W. (2d) 309 (Mo. 1939).

5. Mo. Laws 1939, p. 451. The problems of application of the statute are considered in detail in Note (1940) 5 MO. L. REV. 336.

6. State *ex rel.* Mutual Life Ins. Co. v. Shain, 344 Mo. 276, 126 S. W. (2d) 181 (1939); State *ex rel.* Prudential Ins. Co. v. Shain, 344 Mo. 623, 127 S. W. (2d) 675 (1939).

than determinations on the merits of the cases, which are abstracted below under "Construction of Policies."

II. Offer and Acceptance

The most interesting case decided by the supreme court in the field of insurance in 1939 was *Yeats v. Dodson.*[7] In an action upon a liability policy written through a reciprocal insurance exchange, one of the issues was the law of which state was to be applied. The insured had named the defendant as its attorney in fact, with power to make contracts of insurance and indemnity with other subscribers. The power of attorney provided that all the contracts were to be made at the defendant's office in Kansas City. The reciprocal company operating through this attorney in fact was organized under the laws of Missouri and had an agent who traveled in Oklahoma, the residence of the insured. The agent there took the verbal order for the liability policy covering the insured's entire fleet of cars. The policy in question was mailed from the home office in Kansas City directly to the insured on June 15, 1929, under a covering letter stating that it had taken effect May 31, 1929, to replace a previous policy. The premium was subsequently paid to the agent on one of his visits in Oklahoma. The court held that the contract was completed in Missouri, (1) because the last act necessary to complete the contract occurred in Missouri, (2) the power of attorney designated the home office as the place of contract, and (3) if delivery were necessary, delivery was completed when the policy was placed in the mail in Kansas City. It should be noted that the covering letter indicated that the policy had been regarded as in force even before any attempt was made at delivery. On rehearing, the court disclaimed any intention to hold that a reciprocal insurance company could never make a contract other than at its home office. It is evident, however, that from the nature of a reciprocal, in which a single attorney in fact operates for all the parties contracting with each other, the contract will rarely be consummated at any other place.

In *Bernblum v. Travelers Insurance Co.*,[8] the policy was delivered to the insured with an offer of credit for the premium. On receiving the policy the insured acknowledged in writing that the policy was taken for inspection only and should not become binding unless the premium were

7. 127 S. W. (2d) 652 (Mo. 1939), *modified*, 138 S. W. (2d) 1020 (Mo. 1939).

8. 344 Mo. 217, 125 S. W. (2d) 844 (1939).

paid. The evidence was not considered sufficient to establish any subsequent agreement to pay the premium and rebut the presumption arising from the receipt.

III. Construction of Policy

In *State ex rel. Prudential Insurance Co. v. Shain,*[9] the policy provided double indemnity against death resulting "directly and independently of all other causes, of bodily injuries, effected solely through external, violent and accidental means, of which . . . there is a visible contusion or wound on the exterior of the body," if the death did not result ". . . directly or indirectly from . . . disease in any form." The Kansas City Court of Appeals held that death from typhoid fever was accidental within the terms of this policy. On *certiorari* the supreme court held that there was no room for the contention that death from typhoid fever did not result directly or indirectly from disease and that the decision of the lower court conflicted with its own decisions that unambiguous language must be given its plain meaning. The court declined to say that death from typhoid fever was not "external, violent and accidental," courts of last resort of other states having held that it might be. Does this mean that the opinions of courts of other states are evidence that reasonable men might differ on the meaning of language, but the opinions of our own courts of appeal are not?

In *State ex rel. Mutual Life Insurance Co. v. Shain,*[10] the double-indemnity-for-accidental-death provision of the policy excepted death resulting "directly or indirectly . . . from . . . riding in any kind of aircraft, whether as passenger or otherwise, except as a fare-paying passenger in a licensed passenger aircraft." The policy also stipulated, however, that it was "free from restrictions as to occupation except . . . as to military and naval service." The insured, a trained nurse, was employed as a doctor's assistant at the time the policy was issued, but was regularly employed as an airline hostess at the time of her death from the crash of the airplane in which she was riding. The supreme court held that this policy also was free from any ambiguity and quashed the opinion of the lower court allowing recovery under the double indemnity clause.

In *Homan v. Employers Reinsurance Corp.,*[11] the court pursued the

9. 344 Mo. 623, 127 S. W. (2d) 675 (1939).
10. 344 Mo. 276, 126 S. W. (2d) 181 (1939).
11. 136 S. W. (2d) 289 (Mo. 1939).

tendency to construe insurance contracts as insurance against liability rather than as contracts of indemnity. The reinsurance contract there in question was, by its terms, "subject to" the terms of the primary insurance (which was liability insurance) and "continued concurrently with the liability of the reinsured," applying to "the liability of the reinsured in excess of amounts first herein stated." In one place the reinsurance agreement defined "loss" as "those amounts actually paid to claimants," but the court found that in the instrument as a whole "loss" was in other places evidently used to mean "liability." It would appear from this case that the only safe language to be employed by one drawing up an indemnity contract was the familiar "no action" form.

IV. Misrepresentation

By Section 5732 of the Missouri Revised Statutes, 1929, "no misrepresentation made in obtaining or securing a policy of insurance on the life . . . of any person . . . shall . . . render the policy void, unless the matter misrepresented shall have actually contributed to the contingency . . . on which the policy is to become . . . payable, and whether it so contributed in any case shall be a question for the jury." Section 5729 prohibits "any discrimination in favor of individuals between insurants . . . of the same class and equal expectations of life in the amount . . . of premiums . . . charged . . . or in the dividends or other benefits payable thereon . . ." In *Langan v. United States Life Insurance Co.*,[12] the insured stated in his application that he was fifty-three years old, although in fact he was fifty-five. Premiums were calculated and paid as of the younger age. The policy provided for incontestability after one year, and further provided that if the age were understated the company should be liable only for the insurance which the premium paid would have purchased calculated as of the true age. Upon the insured's death, the company paid to the beneficiary $9,070 on the $10,000 claim. This suit was brought for the balance. There being a conflict between the several courts of appeal, the supreme court took jurisdiction and held that the provision of the policy was valid. The result is certainly fair, but it is at least arguable that the misrepresentation statute covers the situation. The opinion contains some perhaps unfortunate language in its attempt to void that statute, suggesting that it is applicable

12. 344 Mo. 989, 130 S. W. (2d) 479 (1939).

only where the misrepresentation was made to "induce" the issuance of the policy, and distinguishing the instant case because the policy would have issued as easily to the insured if the true age had been given.

V. Foreign Law

No single type of contract so consistently makes contact with more than one jurisdiction as the insurance contract. Almost every insurance case presents a potential conflict of laws problem, although in some the solution is sufficiently obvious to merit no discussion.

As pointed out a year ago,[13] the association of problems of conflicts of laws and of constitutional law is very close and is significant for two purposes: if a constitutional law question, to-wit, the accordance of "full faith and credit" to the foreign law, is involved, not only is the forum limited in its powers, but the Supreme Court of Missouri has jurisdiction whether or not there is conflict with other decisions. Both of these points are illustrated by two cases presented to the supreme court in 1939. Following the decisions in *Robertson v. Security Benefit Ass'n*,[14] and *Clark v. Security Benefit Ass'n*,[15] it was held in *Reece v. Security Benefit Ass'n*,[16] that the decision of the Supreme Court of Kansas (under the law of which state defendant association was organized) that the endowment benefit originally promised in the plaintiff's certificate of membership was *ultra vires* and void, must be given full faith and credit, and that it was error to refuse defendant's instruction in nature of a demurrer to the evidence. A related problem was presented in a somewhat more complicated form in *Baker v. Sovereign Camp, W.O.W.*[17] Defendant company had been organized under the laws of Nebraska as a fraternal benefit association, and had for many years done business in Missouri. In 1879 the Missouri Legislature recognized the distinctive form of organization of fraternal benefit associations, and in 1881 exempted both domestic and foreign societies from operation of the general insurance law. In the revision of the insurance law of 1889, domestic beneficial societies were exempted from the general insurance law, but any reference to foreign associations was omitted. In 1897 it was provided that such foreign associations might register with

13. Evans, *The Work of the Missouri Supreme Court for the Year 1938 (Insurance)* (1939) 4 Mo. L. Rev. 410, 416.
14. 342 Mo. 284, 114 S. W. (2d) 1009 (1938).
15. 343 Mo. 263, 121 S. W. (2d) 148 (1938).
16. 344 Mo. 29, 124 S. W. (2d) 1146 (1939).
17. 344 Mo. 230, 125 S. W. (2d) 849 (1939).

the superintendent of insurance and upon the compliance with certain formalities be exempted from the operation of the general insurance laws. The certificate sued upon in the instant case was issued to the plaintiff's husband in 1896 and provided that he should become a paid-up life member after thirty years compliance with rules and assessments of the association. He paid all assessments for thirty-five years, but was suspended for non-payment before his death. The Supreme Court of Nebraska had held the "life member after thirty years" provision to be *ultra vires* and void.[18] Under the authority of *Sovereign Camp, W.O.W. v. Bolin*,[19] it was held in the instant case that there was a fundamental difference between old-line life insurance and fraternal benefit associations which could not be obliterated by the simple failure of the local legislature to provide for a distinctive regulation; that because foreign beneficiary associations were treated in Missouri in 1896 as old-line companies did not make them such organizations; that admission into a fraternal benefit association is entrance into an abiding relationship and the assumption of a new status; that the state of the organization of such association has exclusive jurisdiction to determine the incidents of that status; and that the decision of the Nebraska Supreme Court must be given full faith and credit and was conclusive of the issue. The history of the *Bolin* case, referred to above, illustrates the effect of the presence of a constitutional issue upon the jurisdiction of the court. The Supreme Court of Missouri denied *certiorari* in that case on the theory that only a conflict of laws question was involved.[20] The Kansas City Court of Appeals having found for the plaintiff, the United States Supreme Court issued *certiorari* to that court.

In *McDonald v. Pacific States Life Insurance Co.*,[21] the defendant insurance company had been placed in liquidation in Colorado, the state of its incorporation. In the present action by the Colorado liquidator to set aside and quash execution against property of the company, it was held that the Colorado statutory system for winding up the insurance company was part of its charter, following it wherever it did business; that the liquidator succeeded to all the rights of the company and could assert and protect those rights as of right and not of comity; and that his position in this regard was not to be confused with receivers appointed by courts of

18. Trapp v. Sovereign Camp, W.O.W., 102 Neb. 562, 168 N. W. 191 (1918).
19. 305 U. S. 66 (1938).
20. 339 Mo. 618, 98 S. W. (2d) 681 (1936).
21. 344 Mo. 1, 124 S. W. (2d) 1155 (1939).

chancery. It was further held that in liquidation of the company, it was not Missouri policy that Missouri assets should be first applied to the claims of Missouri creditors, but rather that the entire assets of the insurance company should be treated as a unit and administered by the court of its incorporation. The order of payment provided by statute for liquidation of a Missouri insurance company was irrelevant.

In *Yeats v. Dodson,* as already said, the court found the contract to have been completed in Missouri. An Oklahoma statute[22] provided that "all contracts of insurance on property of lives, or interests in this state shall be deemed to be made therein." It was held that the state of Oklahoma had no jurisdiction to declare a contract to have been made in Oklahoma regardless of the fact, and to insist upon application of its internal law to a Missouri contract by a Missouri court.

VI. Trial Practice

The insistence of the plaintiff in a personal injury action that the jury understand that the defendant carried liability insurance brought *Schroeder v. Rawlings*[23] to the supreme court. Repeating the familiar doctrine that the plaintiff might on *voir dire* ask prospective jurors of their possible relationship with insurance companies, including the supposed insurer in the actual case, the court held that the existence of this right did not make the carrying of insurance an issue in the case to justify the introduction of that fact in evidence. It further held that the statement by the insured, that he had insurance, made at the time of the accident, was merely narrative of past events and not necessary to presentation of the picture of the accident nor admissible as incidental to an alleged admission of liability. The case is not within the rule permitting the introduction of evidence which is part of the *res gestae* of the main fact at issue, which evidence may incidentally establish the fact of insurance coverage.

VII. Remedies

Two cases[24] applied the principle that Sections 5898 and 5899 of Missouri Revised Statutes, 1929, giving a direct right of action against in-

22. Okla. Stat. (Harlow, 1931) § 10452.
23. 344 Mo. 630, 127 S. W. (2d) 678 (1939).
24. Yeats v. Dodson, 127 S. W. (2d) 652 (Mo. 1939), *modified,* 138 S. W. (2d) 1020 (Mo. 1939); Homan v. Employers Reinsurance Corp., 136 S. W. (2d) 289 (Mo. 1939).

surance carriers to judgment creditors of the insureds, invalidated the indemnity provisions of the policies in question. No matter how strongly the policy may be worded, as that "no action shall lie on this policy except by the named insurer to indemnify him for loss from a judgment against him actually paid and satisfied," the judgment creditor may sue the insurer directly. In the *Homan* case, the action was against the reinsurance carrier, both the debtor and the primary insurance carrier being insolvent. Having first held that under this rule the primary insurance was against liability instead of indemnity against loss, the court declined to pass upon the question of whether the statute applied to actions on reinsurance contracts, relying instead upon the wording of the particular contract to find it a liability policy.

In *Yeats v. Dodson,* the plaintiff had recovered judgment in New Jersey. The judgment debtor had subsequently been discharged in bankruptcy. The court upheld the action despite the lack of a Missouri judgment for the reason that it would not be possible to obtain further judgment against the debtor insured.

PROPERTY

WILLARD L. ECKHARDT*

The Missouri property cases bulk so large that no attempt has been made here to brief or discuss all of them. Cases discussed have been selected for one of three reasons: first, because they are cases of first impression in Missouri; second, because they overrule or modify in important respects earlier Missouri decisions; and third, because holdings or *dicta* seem to be of dubious soundness.

I. POSSESSORY AND FUTURE PROPERTY INTERESTS

A. *Life estates*

Souders v. Kitchens[1] is important in showing that although tenancy by the curtesy was abolished in 1921,[2] the law concerning tenancy by the

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*Assistant Professor of Law, University of Missouri. B.S., University of Illinois, 1935, LL.B., 1937; Sterling Fellow, Yale University, 1937-1938.

1. 344 Mo. 18, 124 S. W. (2d) 1137 (1939).

2. Mo. Laws 1921, p. 119; MO. REV. STAT. (1929) § 319.

curtesy is by no means obsolete, or even obsolescent. Problems in tenancy by the curtesy will continue to arise for many years.

In *Masterson v. Masterson*,[3] testator devised and bequeathed the residue of his estate "to my beloved wife . . . absolutely so long as she remains my widow." The heir of the testator brought a bill to construe this will. The widow claimed a determinable life estate[4] with a power of appointment over the reversion,[5] by reason of the word "absolutely." The court, after ably discussing many precedents, construed the will to mean that the widow took an unencumbered life estate only. The court did not consider the rule that a testator presumably intends not to die partially intestate, which rule would tend to support the widow's construction.

Duffley v. McCaskey[6] is a case of first impression. An intestate's widow had a life estate in Blackacre under her dower right. The reversion[7] was inherited by the intestate's sole heir, his daughter. On the failure of the life tenant to pay taxes, the land was sold at a tax sale to the reversioner. The question presented was whether the reversioner could purchase free from claims of the life tenant, or whether this purchase was merely a payment of taxes, for the benefit of both the life tenant and the reversioner. The court held for the reversioner. "The precise question under consideration has received but scant attention from the courts . . . As a matter of law, inter sese, the duty of paying ordinary annual taxes is on the life tenant . . . There is no reciprocal duty on the part of the remainderman to the life tenant. On the contrary, because of the life tenant's duty, the remainderman has the right correlative to such duty to have the property protected from tax liens."[8] The opinion by Douglas is perhaps the best opinion in 1939 on property. The question presented was important, and the issues were clear. The opinion is brief, but adequate. The court goes beyond the usual range of authorities, and cites the American Law Institute's *Restatement of Property*, and Simes, *Future Interests*. Missouri courts have in the past made too little use in property cases of these outstanding authorities.

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3. 344 Mo. 1188, 130 S. W. (2d) 629 (1939).
4. The court describes the interest of the widow as a "base or qualified life estate . . . subject to defeasance should defendant remarry." "Determinable life estate" more simply denominates her interest.
5. The court calls this future interest a remainder.
6. 134 S. W. (2d) 62 (Mo. 1939).
7. The court calls the future interest a remainder.
8. 134 S. W. (2d) 64 (Mo. 1939).

B. *Concurrent estates*

"A conveyance to create an estate in entirety could only be made by the parties." This digest paragraph in Missouri Statutes Annotated and the American Digest System purports to state the holdings in *Smith v. Holdoway Construction Co.*[9] The statement is part of a sentence lifted out of its context, and is misleading standing alone. By fraudulently representing a quitclaim deed as a trust deed mortgage, a londowner secured his wife's signature, the legal effect being a release of the wife's inchoate dower. The wife asked for cancellation, and the trial court decreed the quitclaim deed void, and "title was ordered vested in the name of Peter F. Smith and Alice M. Smith, his wife, the plaintiff, as their exclusive property." This had the effect of making the husband and wife tenants by the entireties. On appeal, it was held that the cancellation of the deed was proper. "However, the court had no authority either under the pleadings or under general equity jurisdiction to do anything affecting the title except to cancel the quitclaim deed. It could not create an estate, by decree, that had never existed, and which no one had ever intended to create. Plaintiff did not even ask for such relief, but, if she had, *a conveyance to create an estate in entirety could only be made by the parties.* This part of the decree is coram non judice and void."[10] [Italics added] In its context the statement is perfectly accurate, but the digest paragraph out of its context would seem to say that a husband could create a tenancy by the entireties by a direct conveyance to his wife. The simplest proper way to create a tenancy by the entireties in this situation is for the husband and wife to quitclaim to a bachelor over twenty-one, and for the bachelor to quitclaim to the husband and wife as tenants by the entireties.

In *State ex rel. Ashauer v. Hostetter,*[11] the testator devised Blackacre to his daughters Adelia and Mathilda "as tenants by the entirety." Adelia, claiming an undivided one-half in fee as a tenant in common, asked construction of the will, and partition by sale. The trial court sustained Mathilda's demurrer, but was reversed in the St. Louis Court of Appeals.[12] Section 3114 of Missouri Revised Statutes 1929, provides: ". . . every

9. 344 Mo. 862, 129 S. W. (2d) 894 (1939).
10. *Id.* at 877, 129 S. W. (2d) at 908.
11. 344 Mo. 665, 127 S. W. (2d) 697 (1939).
12. See comment on this opinion in Gill, *The Work of the Missouri Supreme Court for the Year 1937 (Property)* (1938) 3 Mo. L. Rev. 398, 399.

interest in real estate granted or devised to two or more persons, other than executors and trustees and husband and wife, shall be a tenancy in common, unless expressly declared, in such grant or devise, to be in joint tenancy." Here the gift was to Adelia and Mathilda as "tenants by the entireties" and not as "joint tenants." If the statute is inflexibly applied, the limitation did not create a joint tenancy. But if the court follows its cliché, "the cardinal rule [or the polestar] in the interpretation of wills, to which all other rules must bend, is that the intention of the testator shall prevail," etc., the daughters will take as joint tenants, because that was the testator's intention.[13] The court applied Section 3114 literally. "Section 3114 makes it plain that a joint tenancy can be created in grantees or devisees, who are not executors, trustees or husband and wife, in one way only, and that is to expressly say so, by using the term 'joint tenancy.' The statute says 'expressly declared.' The word *expressly* is the adverb; *express* is the adjective, which means 'directly and distinctly stated; expressed, not merely implied or left to inference.' [Webster's New International Dictionary, Second Ed.]"[14] This case has been annotated at length in a previous issue of the Missouri Law Review.[15]

C. *Charge or condition*

In *Friesz v. Friesz*,[16] the testator devised one hundred acres to his son William "during his lifetime and after his death to his children . . . The said William A. Friesz to have the above described lands *upon the express condition* that he pay to my executor the sum of money herein required of him ($800)." The life tenant paid the sum late, having acquired the $800 by conveying twenty acres by warranty deed. After the life tenant's death, his children brought this action to recover possession of the twenty acres. Judgment for plaintiffs was affirmed. The court held that this "express condition" was neither condition precedent nor subsequent, but merely a charge. "In doubtful cases the tendency is to favor a construction of provisions for the payment of legacies, or sums of money, if possible, as charges rather than conditions because of an apparent aversion

13. Just why it makes any difference whether the sisters were joint tenants or tenants in common is not clear. Will the court refuse partition of a joint tenancy? If so, joint tenancy can be converted into tenancy in common by a conveyance of one joint tenant to a dummy, with a reconveyance by the dummy to the former joint tenant. The four unities no longer exist.

14. 344 Mo. 665, 670, 127 S. W. (2d) 697, 699 (1939).

15. (1940) 5 Mo. L. Rev. 114.

16. 344 Mo. 698, 127 S. W. (2d) 714 (1939).

to declare forfeitures and an inclination to favor the early vesting of estates."[17] The decision was reached after vigorous argument by counsel,[18] and mature deliberation of the court. The decision is a wise one. Everyone interested in the land is completely protected by the charge construction. It would needlessly penalize the life tenant to construe the words as creating a condition. The instant case is supported by the weight of authority in other jurisdictions.[19] This case, holding that "*express* condition" means "charge," was delivered on the same day as *State ex rel. Ashauer v. Hostetter,* where a statutory requirement that joint tenancy be "*expressly* declared" was applied literally, and the word "express" was elaborately embroidered. The two cases make an interesting study.

D. *Reversions: Doctrine of worthier title*[20]

The rule in *Bingham's Case,*[21] often referred to as the doctrine of worthier title, was well established at common law. It applied to limitations of the following type: *A* transfers Blackacre to *B* for life, remainder to the heirs of *A*.[22] Under the rule, the heirs do not take a remainder by purchase, but take a reversion by descent, if they take at all. In *Norman v. Horton,*[23] *A* conveyed Blackacre to *B* for life, remainder to the heirs of the body of *B,* but if none survive *B,* then to the heirs of *A*. Defendants contended that the future interest given to the heirs of *A* was a reversionary

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17. *Id.* at 703, 127 S. W. (2d) at 717.

18. "Learned counsel (one an able lawmaker as well as an able lawyer) for appellants have represented their clients with exceptional industry and ability in this court and, from the record, in the trial court. From counsel's remark upon oral argument we believe he recognized the difficulties attending his client's cause. The most successful advocates meet occasional reverses, especially where the facts are against the client, as here, regardless of the industry, ingenuity and learning they may bring to the client's cause." *Id.* at 704, 127 S. W. (2d) at 717.

19. *Cf.* Post v. Weil, 115 N. Y. 361, 22 N. E. 145 (1889), where a limitation in a conveyance included: "Upon the special condition that no part of the land or buildings thereon should ever be used or occupied as a tavern." The problem was whether these words gave grantor a right of entry for condition broken (condition subsequent) or created a covenant running with the land. The court said it was not obliged to take the words literally, and held the words created a covenant. The court pointed out that all interests were adequately protected by this covenant construction.

20. See the following able and exhaustive comment by Polsky, *Missouri Law of Limitations to the Grantor's or Devisor's Heirs* (1940) 5 Mo. L. Rev. 232.

21. 2 Co. 91a (K. B. 1600), one of the earliest English cases applying the doctrine. The rule later became known as the "doctrine of worthier title," a reference to one of the rationalizations justifying the existence of the rule.

22. This type limitation must be clearly distinguished from the type limitation to which the rule in Shelley's Case is applied—*A* transfers Blackacre to *B* for life, remainder to the heirs of *B*. The doctrine of worthier title and the rule in Shelley's Case are distinct; a statute abolishing the rule in Shelley's Case does not necessarily destroy the rule in Bingham's case.

23. 344 Mo. 290, 126 S. W. (2d) 187 (1939).

interest, invoking the doctrine of worthier title, or that if a remainder were created, it vested at the death of *A*. Either construction would have led to the same result. The court adopted *B's* contention that the limitation to *A's* heirs created a contingent remainder, those to take being determined as though *A* died at the same moment *B* died. Under this construction there was an attempt to make a gift to *A's* technical heirs, and therefore no occasion to apply the doctrine of worthier title. The court, through Bohling, C., suggests, however, that the doctrine of worthier title is not a rule of law in Missouri, the reason for the rule having vanished with feudal society, and there being no modern reasons of policy for so defeating a testator's intention. The court's approach to the problem deserves all commendation, and it is to be hoped that it will be confirmed when a decision of the issue is necessary.[24]

In *Fullerton v. Fullerton*,[25] a testator bequeathed $2000 to his daughter, Mary Jane Cain, for life, "and in case of her death then said amount to go to her children, and in case she dies without children living, then said sum of money is to be paid to my heirs." The funds were used to purchase land. Mary Jane Cain, the life tenant, died without children, having previously conveyed the farm to one of her brothers who now claims to be the owner in fee. This suit was brought by a grandchild of the testator to determine title and partition the land. The trial court gave judgment for the defendant at the close of plaintiff's evidence. The supreme court reversed the judgment of the trial court. "The will of T. M. Fullerton, deceased, created a life estate only in Mary Jane Cain, and, since no children survived her, the remainder would descend to the heirs of said T. M. Fullerton."[26] "In either event the land would belong to the heirs of T. M. Fullerton."[27] But who are these "heirs" of the testator who are to take? No hint is given. When the testator used "heirs" did he mean heirs or next of kin, in view of the fact that this was a bequest of personalty, and next of kin normally would have been a more appropriate designation. The court says Mary Jane Cain, the life tenant, takes "a life estate only." So she is excluded from sharing in the future interest, even though she was an heir of the testator. Does "heirs" therefore mean all of the testator's heirs except Mary Jane Cain? Or does "heirs" mean those who would be

24. This case is more fully discussed by Polsky in Comment (1940) 5 Mo. L. REV. 232, 237.

25. 132 S.W. (2d) 966 (Mo. 1939).

26. *Id.* at 969.

27. *Id.* at 970.

heirs of the testator had he died at the same time as the life tenant, the construction in *Norman v. Horton*? The court does not discuss the interesting problem whether the heirs take by descent or by purchase, *i. e.*, whether the doctrine of worthier title applies to personalty. The court says: "The *remainder* would *descend* to the heirs." Here is an inherent contradiction. If the heirs take a remainder, they take by purchase. If they take by descent, the interest must be a reversion and not a remainder.

E. *Alienability and subjection to claims of creditors*

Some statements of the court in *White v. Kentling*[28] raise serious questions. Frank Kentling, Sr., conveyed Blackacre by warranty deed to Bank: "In case this land is not used for the purpose of a bank and this corporation passes out of existence said property is to revert to the grantors." In a suit to determine and quiet title, the plaintiff was a trustee liquidating the grantee bank and the defendant was Frank Kentling, Jr., son of the grantor. "A reversion[29] *ipso facto* is expressly provided for . . . We, therefore, hold that the deed to the bank conveyed a base or qualified fee determinable upon the concurrence or simultaneous existence of the two events or circumstances referred to in the deed,"[30] *viz.*, the land is no longer used for purposes of a bank, and the corporation passes out of existence. The statement that is questionable follows: "The rights of the defendant Frank Kentling, therefore, are entirely contingent . . . (2) upon his own survivorship of his parents, as an heir of the said grantors, and at [*sic*, of] the time said base fee determines and title to said real estate reverts."[31] Is the court suggesting that we apply in 1939 in Missonri the common law rules as to descent of future interests? At common law the descent of future interests is determined at the time such interests vest in possession by tracing heirship to the person last seised, the grantor, in the case of a reversion, possibility of reverter, or right of entry for condition broken, and to the last purchaser, the grantee, in the case of a remainder or executory interest. Some common law authorities suggested or held that a possibility of reverter was not inheritable, but that the person who became entitled to the possession under a possibility of reverter

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28. 134 S. W. (2d) 39 (Mo. 1939).
29. It would seem that the future interest is a possibility of reverter, and not a reversion.
30. 134 S. W. (2d) 39, at 44.
31. While the court always refers to the future interest as "contingent," it is a possibility of reverter and is "vested" under the rule against perpetuities.

took by representation.[32] But today future interests descend in the same way as possessory interests,[33] except in Maryland where the common law rules are still followed.[34] At common law a possibility of reverter was not alienable *inter vivos,* but at the present time it is alienable *inter vivos* in many states, and should be alienable in Missouri under Section 3014 of Missouri Revised Statutes, 1929: "Conveyances of lands, *or of any estate or interest therein,* may be made by deed." When the court says that Frank Kentling's interest is wholly contingent on surviving to the time of vesting in possession, does it mean that his *inter vivos* conveyance by warranty deed for valuable consideration would be of no effect, or that he could not transfer the interest by will, or that his heirs will not inherit it from him if he has not disposed of it during his lifetime?[35]

Kay v. Politte[36] is a case of first impression in the Missouri Supreme Court, and overrules an earlier court of appeals case. Thomas M. Politte died in 1920, leaving a widow and children. Two years later a judgment was had by a creditor against an adult son, Paul Politte, and his interest in the land was sold at execution sale in 1925 to Louis Kay. Kay now brings this action to determine title and for partition. The objection to such sale is that the heir's interest would be sold at a sacrifice because the length of dower and homestead estates is uncertain. In *Armor v. Lewis,*[37] the problem was whether the fee could be sold subject to homestead, to pay a debt of the *homesteader* contracted subsequent to the acquisition of the homestead, but not made a charge thereon. It was held that such a sale was not

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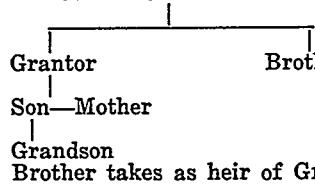
32. Copenhaver v. Pendleton, 155 Va. 463, 155 S. E. 802 (1930).

33. The difference may be illustrated with the following hypothetical.



Grantor has a possibility of reverter. He dies intestate. Son dies intestate. Grandson dies intestate. The possibility of reverter becomes possessory. At common law when the future interest vests in possession, heirship must be traced to the person last seised, Grantor. Mother is not an heir of Grantor, and does not take. Brother takes as heir of Grantor. If future interests descend in the same way as present possessory interests descend, Son inherits the interest from Grantor, Grandson inherits from Son, and Mother inherits from Grandson.

34. Reno, *Alienability and Transmissibility of Future Interests in Maryland* (1938) 2 MD. L. REV. 89.

35. That the question is not an academic one is illustrated by two Illinois cases decided in the same year, and appearing in the same volume, Golladay v. Knock, 235 Ill. 412, 85 N. E. 649 (1908), and North v. Graham, 235 Ill. 178, 85 N. E. 267 (1908). In Golladay v. Knock, the common law rule of descent was applied to contingent remainders. In North v. Graham, the court held that a possibility of reverter descended in the same way possessory interests descend.

36. 344 Mo. 805, 129 S. W. (2d) 863 (1939), annotated in (1939) 122 A. L. R. 1150.

37. 252 Mo. 568, 161 S. W. 251 (1913).

authorized by statute.[38] Lamm, J., gave as a further reason the sacrifice such a sale would necessarily involve. In *Kelley v. Parman*,[39] it was held that the fee subject to homestead could not be sold to pay the debt of an adult son, heir of the homesteader. The sacrifice reason was used. This seems to be the same issue as presented in the principal case. However, in the principal case the court held that the interest of an adult son who is heir is subject to levy of execution, even though the interest must be sold at a sacrifice. "Reaching this conclusion we necessarily overrule the opinion in *Kelley v. Parman* . . . in so far as it runs counter to the ruling here."[40] The decision is correct. The son's interest is a reversion. Vested remainders and reversions are generally considered subject to the claims of creditors, and there is no reason for exempting a reversion that follows homestead. A much more serious objection can be raised to a forced sale of contingent remainders or executory interests, which often are completely sacrificed. In the principal case the judgment debtor had a reversion of one-eleventh of $10,000, and the interest sold for $477.50. This would seem to be a fair price at no sacrifice.

F. *Succession taxes*

In re Bernays Estate[41] completely changed what had generally been considered the law in Missouri. Eric Bernays died testate, leaving personal property to a trustee, for his widow for life, then to his daughter for life, then over. The will provided that the provisions therein for the wife were in lieu of "dower, homestead, allowances, rights of election and all other rights in my estate." The widow took under the will. The widow's life estate was valued at $83,000, from which was deducted the $20,000 exemption, leaving $63,000 on which the succession tax was assessed. The widow contended that she should have an additional exemption of the value of her dower or child's share, year's sustenance and absolute allowances. The court states the issue as follows: "As appellants say, the principal issue presented is whether or not the widow's statutory interests in the property of her husband, had he died intestate, should be deducted in computing the taxable value of the estate, or perhaps we should say, of the property received by her, so far as concerns the imposition of what, for

38. Mo. Rev. Stat. (1929) § 612.
39. 282 S. W. 755 (Mo. App. 1926).
40. 344 Mo. 805, 811, 129 S. W. (2d) 863, 865 (1939).
41. 344 Mo. 135, 126 S. W. (2d) 209 (1939).

convenience, we may call the inheritance tax, where, as here, the husband makes provision for her, which she accepts, in lieu of such dower and other statutory property and rights. This precise question has not heretofore been decided by an appellate court in this State."[42] The construction contended for by the widow had for many years been followed in assessing taxes. The state treasurer in 1929 issued a pamphlet, generally followed since, stating: "Exemption of widow or widower is twenty thousand dollars plus the value of a child's share in the entire net estate, whether he or she takes by will or by the intestate laws." This opinion was based on an interpretation of *In re Rogers' Estate,*[43] which had held that a widow who rejects a will and takes a child's share is not subject to pay any tax. The majority of the court does not disapprove *In re Rogers' Estate,* but says: "She was not compelled to accept the provision of the will. She was at liberty to reject it and take what the law would have given her absent a will. If she preferred the testamentary provision, burdened with a succession tax, she had the right to accept it . . ."[44] The court held that the opinion of the state treasurer was not binding, but was based on a misinterpretation of *In re Rogers' Estate.* A concurring opinion by Westhues, C., approved of the result of this case, but asserted that the rule of *In Re Rogers' Estate* was wrong and that the case should be overruled, so that a widow who elects a child's share should be considered to take by intestate law and subject to the succession tax.

II. Non-possessory Property Interests

A. *Easements*

Riggs v. Springfield[45] is questionable both in its reasoning, and in its merits. In 1893 the city of Springfield started emptying raw, untreated sewage into Wilson Creek. This was continued intermittently, but in increasing amounts, until the time of this suit in 1934 by a riparian owner for damages to his land. Judgment for the plaintiff was affirmed in the Springfield Court of Appeals,[46] which certified the case to the supreme court because of conflicting Missouri authorities. The plaintiff's theory was that defendant could acquire an easement to continue to pollute the

42. *Id.* at 139, 126 S. W. (2d) at 212.
43. 250 S. W. 576 (Mo. 1923).
44. 344 Mo. 135, 146, 126 S. W. (2d) 209, 216 (1939).
45. 344 Mo. 420, 126 S. W. (2d) 1144 (1939).
46. Riggs v. Springfield, 96 S. W. (2d) 392 (Mo. App. 1936).

stream without paying compensation only by adverse user for ten years, and that no easement had been acquired because of the interruptions in user, and because the scope of user was not the same; because the city had not acquired an easement by prescription, it must now acquire one by eminent domain, with compensation. Apparently the city had not acquired an easement by prescription. The defendant claimed that when it began permanently to pollute the creek in 1893, it had appropriated an easement by eminent domain. This easement acquired by eminent domain is not limited to the scope of user at the time it is taken, but is broad enough to cover increased use. Thus the city need not rely on prescription for acquisition of an easement. The court adopts this argument of the defendant. The view appears to be logically sound.

It is then urged that the riparian landowner's cause of action for compensation is barred by the five year statute of limitations. To prevent the bar of the five year statute, plaintiff relied on Section 21, Article X, of the Missouri Constitution, which provides: ". . . private property shall not be taken or damaged for public use without just compensation . . . until [such compensation] shall be paid to the owner, or into the court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested . . ." The court holds this constitutional provision inapplicable where an easement is acquired by eminent domain. "No part of plaintiffs' land was taken within the meaning of the Constitution, only an easement to use the watercourse was appropriated, so that it was not necessary first to institute condemnation proceedings."[47] "But the city has not disturbed the property of plaintiff, nor divested him of any proprietary rights. It has not invaded his land . . ."[48]

The only trouble with this argument is that the constitution uses the word "property" and not the word "land." Analyzed qualitatively, an easement in land is just as much "property" as is a fee simple in land. Professor Bigelow, among others, has discussed the problem: "It is worth while to pause for a moment to point out that this terminology, 'corporeal' and 'incorporeal' rights, is not a scientfically sound one. The law is never concerned with a physical object as such. The sole subject-matter of law is rights, and rights are in all cases relations between individ-

47. 344 Mo. at 430, 126 S. W. (2d) at 1148.
48. *Id.* at 434, 126 S. W. (2d) at 1151.

uals. The relation may be purely between individuals, or it may be between individuals with respect to physical objects, such as chattels or land. But rights as such in every case are merely intellectual concepts."[49] It is submitted that the court's distinction between "land" and "easements" on a property theory is unsound.

The holding of the case is unfortunate on its merits, because it penalizes the ordinary decent citizen. The doctrine of prescription often penalizes the good neighbor who submits to minor invasions of his property interests rather than sue, and who later in outraged virtue finds the invader has acquired an easement. Prescription is too well established to be rejected at this late day. But why should a similar result be reached where it is not compelled by previous authority? The holding of this case compels a landowner to sue a city within five years from the time the city starts apparently permanent actionable pollution. Perhaps the nuisance is not great, and the landowner would rather suffer this degree of annoyance than sue. He does not want to be cantankerous. Five years elapse, and he finds that the city can continue and can increase the pollution without compensation. Or perhaps he decides to sue, but in a few months the city stops pollution, and he does nothing. Ten years later the city again begins to pollute the stream. The city has acquired a permanent easement.

III. Security Interests in Land

In *Murphy v. Milby*,[50] Albert B. Milby executed a trust deed mortgage in March, 1914, to secure a note for $4500. Nannie Murphy now owns the note. In January, 1934, Alex T. Stewart, as agent under oral authority for Nannie Murphy, executed and filed an affidavit showing the amount due under the mortgage. This is an ejectment action by Nannie Murphy, holder of the note, against the heirs of the mortgagor who are in possession of the land. Judgment for the plaintiff is affirmed. Section 865, Missouri Revised Statutes, 1929, provides that a deed of trust cannot be foreclosed after the Statute of Limitations has run on the debt secured thereby, "nor in any event after the lapse of twenty years from the date at which the last maturing obligation . . . unless before the lapse of said twenty years the owner of the debt thereby secured or some person for him shall file an affidavit duly verified, or file an instrument in writing acknowledged as

49. Bigelow & Madden, Introduction to the Law of Real Property (2d ed. 1934) 38.

50. 344 Mo. 1080, 130 S. W. (2d) 518 (1939).

deeds are required to be acknowledged in order to entitle them to record in this state, showing the amount due and owing thereon." The affidavit filed here was sufficient in substance. The issue is whether the agent's authority must be in writing under the Statute of Frauds because the affidavit affected an interest in land. "It is not the purpose of an affidavit made pursuant to Section 865, *supra,* to affect to real estate, and it does not do so. Such an affidavit only serves as a notice to the public that the indebtedness secured by a deed of trust or mortgage has not been paid. We are of the opinion that such an affidavit may be made on behalf of the creditor by an agent under oral authority."[51] It would seem, however, that the affidavit very directly affects an interest in land. The filing of the affidavit does not affect the debt at all, nor does it toll the running of the statute on the debt. The sole purpose of this affidavit is to toll the running of the statute on foreclosure. Because the affidavit prevents a barring of foreclosure, it would seem to affect an interest in land. It is quite another question whether on the merits the agent should have written authority. A much more serious problem is on what theory the holder of the note could bring ejectment even if the mortgage were still good. The trustee under the deed of trust could bring ejectment as an incident of his title, but the holder of the note has no legal, and certainly no equitable, right to possession.

Bates v. Dana[52] presented an interesting and a difficult problem. Anna Sellner held a mortgage for $8,500 and Bank held a mortgage for $66,000 on certain Missouri land. There was a dispute as to priorities, and the two mortgagees entered into an agreement reciting the Bank's mortgage and that Mrs. Sellner held a "second mortgage," and providing further. ". . . should it become necessary to and the undersigned [Bank] begins to foreclose its said mortgage upon the real estate in Marion county, Missouri . . . then the said bank agrees that it will . . . take up by assignment to it the said [Sellner] note and mortgage . . . at the amount of the unpaid balance of the principal and accrued interest thereof and thereon." The Bank became insolvent and passed into receivership in 1932. In 1933 the Bank brought this suit in equity to foreclose its mortgage. The trial court decreed that the Bank's mortgage be foreclosed and that the proceeds be applied to satisfy the Bank's mortgage, then Mrs. Sellner's mortgage. On appeal, the trial court was reversed. The Bank contends that it had a first mortgage, and that the agreement imposed

51. *Id.* at 1084, 130 S. W. (2d) at 519.
52. 133 S. W. (2d) 326 (Mo. 1939).

on it merely a personal obligation to take up the note, that is, that Mrs. Sellner had the "personal" obligation of the Bank, an interest in the Bank's fund, but only a subordinate "property" interest in the mortgaged land. If she had a mere personal interest she could share only *pro rata* with other creditors in the Bank's fund. Mrs. Sellner contends that in equity she has prior rights against the real estate, and is entitled to priority of payment over the Bank out of the proceeds of the foreclosure sale, that is, that she has a prior "property" interest in the land.

The Bank invoked the aid of equity to foreclose. "He who seeks equity must do equity." The Bank's obligation to take up the Sellner note matured not after foreclosure was complete, but when the Bank first sought the aid of a court of equity to foreclose. The bank's insolvency and the intervening receivership prevented the Bank's performance. ". . . the Bank's obligation to 'take up' should the Bank 'begin to foreclose' carried an implied obligation to refrain from consummating foreclosure until after the bank purchased. . . . This construction gives business efficacy to the contract as written. It gives the contract that effect which the parties apparently did agree upon and that effect which, as fair and reasonable men, they, in equity, presumably would have agreed explicity upon if, having in mind the possibility of the Bank's insolvency, they had contracted expressly in reference thereto."[53] Mrs. Sellner therefore is given priority in foreclosure proceeds. It would seem that the agreement gives the Bank legal priority in the property. We have in effect the court in equity converting a legal second mortgage into an equitable first mortgage with priority over a legal first mortgage, on the implied agreement of the parties. Mrs. Sellner has an equitable property interest instead of a mere legal personal right. The holding is entirely just, and the court is to be commended on its willingness to struggle, if needs be, to arrive at that conclusion.

53. *Id.* at 330.

PUBLIC UTILITIES

FRANK E. ATWOOD*

The volume of utility cases reaching the Supreme Court of Missouri for review has been small since the decision in the case *State ex rel. Gehrs v. Public Service Commission.*[1] That decision held that Sections 5234 and 5237, Missouri Revised Statutes, 1929, authorizing an appeal to the supreme court from a judgment of the Circuit Court of Cole County, Missouri, reviewing an order of the Public Service Commission, was in conflict with Section 12, Article VI of the constitution. In consequence of this decision, a number of cases have reached our courts of appeal, involving public utilities during the year 1939, but few cases have involved grounds of supreme court jurisdiction.

Missouri Power & Light Co. v. Pattonsburg,[2] was a suit to restrain a municipal corporation from letting contracts for the construction of electric light systems, the issuance of bonds, the levying of taxes for payment thereof, and the operation of the plant. From an adverse judgment below, the plaintiff appealed.

The city had voted favorably upon the single question of the issuance of $50,000 in bonds for the purpose of *constructing* an electric light plant, whereas Section 12a, Article X of the Missouri Constitution authorizes the city to submit to the voters the question of becoming indebted "for the purpose of *purchasing or constructing* . . . electric or other light plants." The contention of the plaintiff was that this constitutional provision "does not authorize the aldermen to decide in advance whether to purchase or construct, but after the vote the city officials decide on the method of acquisition."

It has often been held that it was competent to submit such a proposition in the alternative,[3] but of the point made in the case under discussion the court said "our state has not revealed any case where such contention has been made." In passing, it may be said that the view of the court in the *Columbia* and *Canton* cases represents the majority view. Drawing from

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*Attorney, Jefferson City. A.B., William Jewell College, 1902, A.M., 1912, LL.D., 1930. Former member of the Supreme Court of Missouri.

1. 338 Mo. 177, 90 S. W. (2d) 390 (1935).
2. 343 Mo. 1128, 125 S. W. (2d) 20 (1939).
3. State *ex rel.* Columbia v. Allen, 183 Mo. 283, 82 S. W. 103 (1904); State *ex rel.* Canton v. Allen, 178 Mo. 555, 77 S. W. 868 (1903).

these cases by analogy, the court was of the opinion that the submission of the question in the singular, as was done in the case under discussion, was fully authorized.

The next question ruled is one which has been long established in this state, namely, that it is not necessary for a city to obtain a certificate of convenience and necessity from the State Public Service Commission before a municipal light plant can legally be constructed.

A third point raised involved the authority of the city to build a smaller plant than was in contemplation at the time the city voted on the proposition, plans for the larger plant having been drawn and submitted with an application to the Federal Government for a grant of $17,420 and a loan of $50,000 for its construction. The court held that while the ordinance submitted to the people stated specifically that it was for the purpose of determining whether the city should become indebted in the sum of $50,000 for the purpose of constructing an electric light and power plant, no reference was made in the ordinance voted upon to the proposals made to the Federal Government and the acceptance or rejection of the plan by the Federal Government would not affect the validity of the election.

State ex rel. Sikeston v. Missouri Utilities Co.,[4] was a proceeding in *quo warranto* to oust the Missouri Utilities Company from the rights and privileges to use the streets and public ways of the City of Sikeston, Missouri, and asking ouster of the utility company. This case represents the third effort of the city in that direction. The first case, *State ex rel. Sikeston v. Missouri Utilities Co.*,[5] was instituted in 1931, and ouster was denied on the ground of estoppel. The second case was *State ex rel. Sikeston v. Public Service Commission.*[6]

In the case under discussion, the lower court sustained a general demurrer to the petition, and upon relator's refusal to plead further, the same was dismissed. From this judgment of dismissal relator appealed.

The facts are substantially the same as were the first *Sikeston* case. In 1902, the predecessor of the Missouri Utilities Company obtained by ordinance a franchise running to its successors and assigns, "to use the streets, avenues, alleys and public ways of said city for its light power distribution system . . ." for a period of twenty years. The ordinance was approved December 16, 1902, and by its terms expired December 16, 1922. Relator's petition refers to the first *Sikeston* case, and draws certain con-

4. 137 S. W. (2d) 456 (Mo. 1939).
5. 331 Mo. 337, 53 S. W. (2d) 394 (1932).
6. 336 Mo. 985, 82 S. W. (2d) 105 (1935).

clusions in regard thereto calculated to sustain its contention that said first case no longer applied. The petition further recites that the city failed to prevail in the first case, on the ground that it permitted the utilities company to operate without a franchise from December 16, 1922 to July 15, 1931, without objection, collecting taxes of various kinds during that period; that it appeared at a hearing before the Public Service Commission and acquiesced in an order of that commission permitting and approving the purchase by respondent company of the equipment and property involved in the order, and authorizing the issuance of stocks, bonds and other forms of indebtedness to pay for the same, and thereafter allowed the utilities company to operate in the city without objection.

The petition denies that the city accepted the order of the Public Service Commission referred to in the first case, and charges that the return to the alternative writ of the respondent in that case was false in its allegation of facts; that the Missouri Utilities Company did not rely in good faith upon the city's acquiescence in the use of the streets, but since the expiration of its franchise in 1922, sought and continued to seek a new franchise from the city. These are the important allegations, among many others, made in the petition.

Division Two of the Supreme Court held that it had no authority to overrule a decision of the court *en banc* in the former *Sikeston* case It also held that the city was precluded by estoppel from denying the authority of respondent, whose franchise had expired, to engage in electrical business.

The opinion further held that, since the records of the Public Service Commission show that the city was represented by counsel at that hearing and had accepted the Commission's orders, "this belated—and it seems to us somewhat collateral—attack on the validity and binding force of the Public Service Commission's orders and the city's acceptance thereof, and upon our decision in said first *Sikeston* case, cannot prevail."

TORTS

GLENN A. MCCLEARY*

The volume of business presented to the court from the field of Torts continues to be as heavy as in any of the previous periods reviewed in this annual study of the work of the court. As pointed out in an earlier study,[1] the *Restatement of the Law of Torts*, is having a persuasive effect in the decisions. Outside of new life given to the attractive nuisance doctrine, or the liability of a possessor of land to a child trespasser for harms which the latter receives on the premises of the possessor, the court during this period applied well settled doctrines to factual situations which varied slightly from situations previously dealt with. Again the decisions in which the humanitarian doctrine was presented are given special treatment so that the doctrine may be examined more critically.[2]

I. NEGLIGENCE

A. *Duties of persons in certain relations*

1. Possessors of Land

The most significant case in this field for the period under review is *Hull v. Gillioz*.[3] There an eight year old child sued for personal injuries received when a heavy iron I-beam fell upon her. These beams had been piled in two layers with heavy timbers underneath the bottom layer and smaller timbers between the two layers of beams. Among these I-beams were some about forty-three feet long, twenty-four inches high, with a nine and one-fourth inch flange at the top and bottom, weighing about seventy-two and one-half pounds per lineal foot. They were kept upright on one flange, instead of lying on the edges of both flanges, to prevent warping and to make painting easier. The defendant was a contractor and owned the eighty by one hundred forty foot lot, using it as a storage place for heavy material used in construction work. The lot was located in the City of

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*Professor of Law and Dean of the Law School, University of Missouri. A.B., Ohio Wesleyan University, 1917; J.D., University of Michigan, 1924; S.J.D., Harvard, 1936.

1. See McCleary, *The Work of the Missouri Supreme Court for the Year 1937 (Torts)* (1938) 3 Mo. L. REV. 420, 421.

2. Discussed by Mr. Barker.

3. 344 Mo. 1227, 130 S. W. (2d) 623 (1939), noted in (1939) 4 Mo. L. REV. 466.

Monett and was not fenced because a fence would have interfered with the moving in and out of the heavy materials stored there. No watchman was kept at the time, nor was the defendant or his employees upon the lot at any time except when they were there to get material. There was a partially broken "Keep Off" sign nailed on a stack of piling on the east side of the lot. Part of the letters were gone, but the words could still be made out. Another sign which had been near the north end of the lot was gone at the time of the plaintiff's injury. There were houses on each side of this lot, across the street and on streets close by. Plaintiff's family lived in the house adjoining it on the east, having moved there with another family a week before she was injured. There were two small children in each of these families, the oldest of the four being ten years of age. According to the plaintiff's evidence many children between the ages of three and sixteen years had used this lot as a playground and had played on these I-beams for six or seven years before the plaintiff was injured. For a year or more prior to the plaintiff's injury one of the outside top beams could be moved and rocked, so that a loud noise could be made in striking the beam next to it. According to the plaintiff's evidence, there would be about twenty-five or thirty children rocking this beam at a time. Eventually the beam worked itself off of the timbers supporting it. There was also evidence that the truck driver for the defendant had been notified of this dangerous condition, and that the defendant had been told about an injury which another child had sustained on the piling stored on the lot. When this beam fell, plaintiff and three other small children were sitting on the beam rocking it. The beam fell on one of the plaintiff's legs crushing it so that it had to be amputated. The plaintiff's case was based on the attractive nuisance doctrine, and the sole question on appeal was the sufficiency of the evidence to make such a case.

The attractive nuisance doctrine up to this case had had very little growth in Missouri law. Outside of its application to injuries received from turntables, usually referred to as the turntable doctrine, there had been a steady line of decisions which had indicated that the tendency was to restrict the doctrine. The court in the *Hull* case has given new life to it and undoubtedly the American Law Institute's *Restatement of the Law of Torts* is the persuasive force in giving this new direction. Section 339 of the *Restatement* is set forth in the opinion: "A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains on the land, if (a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and

(b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

However, the court pointed out that it would not go the whole way with the *Restatement*: First, the doctrine is to be limited to situations where children's trespasses are due to the attractions of a dangerous instrumentality or condition, instead of applying it to conditions and instrumentalities that children could not see or know about without first becoming trespassers; and, second, the doctrine is to be limited to instrumentalities and conditions which are inherently dangerous, instead of applying it to conditions in which danger has been created by mere casual negligence under particular circumstances. The court defines "inherently dangerous" to mean danger inhering in the instrumentality or condition itself, at all times, so as to require special precautions to be taken with regard to it to prevent injury; instead of danger arising from mere casual or collateral negligence of others with respect to it under particular circumstances. It seems questionable to the writer whether in this particular the court and the *Restatement* are really very far apart. At least the court provides a wholesome check against too free an extension of the doctrine, resulting in placing too much responsibility on the possessor as to this class of harms. This is made even clearer by the court pointing out specifically that the doctrine will not be applied to wheelbarrows, lawnmowers, upturned rakes, scythes, to other tools left where someone might step on them, to meddling with farm implements left in a field, to climbing fruit trees or windmills, or to sliding down hay stacks or hay chutes.

In *Mann v. Pulliam*,[4] a social guest sued the possessor of land for injuries received as she was leaving the premises in the evening, when she was caused to fall due to an unexpected drop in the steps of the porch. The last step, being made of concrete and having the same color as the walk below, reflected the light from the street and porch in such a manner as to give the illusion that the walk had been reached. There were six steps to this group, the top five of which were wooden steps painted gray, the lower step

4. 344 Mo. 543, 127 S. W. (2d) 426 (1939), noted in (1939) 4 Mo. L. Rev. 470.

and walk were of concrete material of a natural color and thus of a different color than that of the five upper steps. The sole question in the case was whether there was negligence in maintaining the steps and walk as described. The court held that no reasonable person should have foreseen that someone might sustain such an injury as the plaintiff did. The holding is not so satisfactory since it is subject to two interpretations. The opinion may imply that there would have been a duty to make safe or to warn had this been a known dangerous condition, a fact which was not mentioned. However, this would be at variance with a long line of Missouri decisions, holding that a gratuitous licensee takes the premises as he finds them and no duty is owed to warn or make safe on the part of the possessor.[5] The more plausible interpretation of this decision is that no duty is owed to such a gratuitous licensee even if a risk of injury could have been foreseen by the defendant.

There was the usual number of cases involving the liability of a possessor of premises to business guests (invitees) for injuries arising from dangerous conditions existing on the premises. In *Becker v. Aschen*,[6] there is the novel situation of injuries received by a motorist who slipped on an oily grease rack step in descending from his automobile, after placing the car on the stationary grease rack at the direction of the defendant in a filling station owned by the Standard Oil Company, one of the defendants, and operated by Aschen. The defendants relied on cases dealing with persons who fell on properly oiled or waxed floors, and cases where persons were caused to fall by reason of the condition of floors, which condition was not shown to have been known or could have been expected by the owner or occupant. The court held that grease and oil on steps would produce a dangerous and unsafe condition as a matter of common knowledge, and that the comparison the defendant was attempting to draw with properly oiled or waxed floors or marble or stone stairs was not reasonable. The issue of defendants' negligence under these facts was for the jury. In *Stoll v. First National Bank of Independence*,[7] the plaintiff's evidence showed that she was fully cognizant of the smooth and slippery condition of the floor and stairs of the defendant bank, where she fell sustaining injuries. The de-

5. What authority there is in the cases holds that a social guest is a gratuitous licensee since he comes on the premises for his own benefit. To be considered an invitee (business visitor), the object of the visit must be some commercial benefit to the possessor. The Restatement of the Law of Torts holds a possessor of land liable to gratuitous licensees for known dangerous conditions unless a warning is given. RESTATEMENT, TORTS (1934) § 342.

6. 344 Mo. 1107, 131 S. W. (2d) 533 (1939).

7. 134 S. W. (2d) 97 (Mo. 1939).

fense was that there was no negligence on its part since the plaintiff had all the information which she would have been entitled to from the defendant in the performance of any duty to a customer of the bank. The theory of the defendant was not that the plaintiff was contributorily negligent, but that there was no breach of any duty on its part. The court held that the trial court erred in failing to give the defendant's peremptory instruction in the nature of a demurrer to the evidence.

The status of an employee of a contractor to which the highway commission had let a contract for the construction of a railroad overpass was held to be that of an invitee on the railroad right-of-way, in view of the contract between the railroad company and the highway commission granting the commission or its contractor permission to enter upon the right-of-way for the purpose of constructing the overpass, in *Willig v. Chicago, Burlington & Quincy R. R.*[8] His presence there was undoubtedly to the business benefit of the railroad company in having the overpass constructed, at least he was not there solely for his own benefit or the benefit only of the contractor or highway commission so as to be considered merely a gratuitous licensee as to the railroad company. Therefore, in an action against the railroad company for wrongful death, it was for the jury to determine whether or not the defendant was negligent in operating special trains past the construction work at a speed of from forty to fifty miles per hour.

2. Lessors

In *Schneider v. Dubinsky Realty Co.*,[9] the porch immediately in the rear of the plaintiff's second floor apartment gave way while he was on it, causing him to be dropped to a concrete pavement on the ground about fifteen feet below. It was urged that the defendant's demurrer to the evidence should have been sustained because the plaintiff was injured on that part of the premises claimed to have been set apart solely for plaintiff's own use. It was shown that the porch was used for temporary storage of garbage by both tenants having doors opening onto the porch; that the garbage was removed daily and the porch swept and cared for by the janitors furnished by the lessor; that other tenants used the porch in stringing clotheslines from its railing to the railing across the areaway and in hanging out laundry. The case was held to fall within the well established rule which imposes a duty upon the landlord to use due care to

8. 137 S. W. (2d) 430 (Mo. 1939).

9. 344 Mo. 654, 127 S. W. (2d) 691 (1939).

keep those portions of the premises in a reasonably safe condition over which he has retained control and which are used in common by two or more tenants.

A more troublesome problem in the case was to determine who was the lessor. Under an agreement between the apartment house owner and the trustee named in a deed of trust, covering the apartment house, it was provided that the trustee appointed the owner as agent to collect the rents and continue in the management of the mortgaged premises. It also provided that the agreement should not impair the right of the trustee or holders of the secured notes to foreclose the trust deed. The court found that the parties intended this agreement merely as an assignment of the rent from the owner to the trustee, that the owner was not the agent of the trustee, and that the trustee was not liable for the injuries sustained. The plaintiff had sued both the owner and the trustee.

3. Municipal Corporations

Injuries resulting from conditions in streets and sidewalks were the basis of three cases against municipalities. In *Hunt v. Kansas City*,[10] the injuries resulted from falling into an open coal hole in a public sidewalk. The instructions required the jury to find that the hole was left open, constituting a condition not reasonably safe for pedestrians, and that the hole was negligently left open for several weeks or for such length of time so that the city by the exercise of ordinary care could have known in sufficient time to have remedied the condition and have prevented the injury to the plaintiff. There was nothing new in the law involved, but the appellant, however, contended such language told the jury, in effect, that the city was obliged to prevent an injury at any and all hazards. The court did not believe this misled the jury as to the measure of duty owed by the defendant. However, in *State ex rel. City of Jefferson v. Shain*,[11] an instruction was erroneously given which permitted a recovery by the plaintiff if the sidewalk were found to be defective. It is not sufficient that the jury find the sidewalk to be defective, but it must be found that the sidewalk was not in a reasonably safe condition. The evidence relative to the depth of the step-off, causing the plaintiff to be thrown from her balance and her foot to be sprained as a result of the step-off or depression in the sidewalk caused by

10. 131 S. W. (2d) 514 (Mo. 1939).
11. 344 Mo. 57, 124 S. W. (2d) 1194 (1939).

one section or block of the sidewalk being lower than the other, ranged from one and one-half to four inches. The court held that the defect being undisputed was an additional reason why an instruction requiring the jury only to find the sidewalk to be defective was positive misdirection. In *State ex rel. Kansas City Gas Co. v. Shain*,[12] the plaintiff was allowed a recovery for the negligent obstruction of the south side of a street, for the negligent failure to warn westbound motorists of the use of the opening in the obstruction by the public to cross the street, and for the negligent failure to warn pedestrians crossing the street at that point of danger of approaching westbound automobiles. The excavation, two feet in width and from three to four feet deep, was located eight feet south of the north curb. From eight to twelve inches of concrete pavement had to be removed, and the material taken out was laid on the south side of the trench and the dirt was placed on the north side. The street at this point was approximately twenty-six feet from curb to curb, but, due to these materials, the width had been reduced to about six feet according to the apparent finding of the jury. Owing to conditions existing, both east and west traffic on the street was confined to that narrow portion left open for travel on the south side of the street. The injury to the plaintiff was caused by his being struck by an automobile traveling west, when he emerged into the street by way of an open driveway which was left from the sidewalk to the street, running between the mounds of earth and materials piled five or six feet high. There were no lights and no person there to warn pedestrians and motorists, and it was unusually difficult for either to see the other approaching.

4. Supplier of a Chattel

In two cases an employee brought action against the employer on the theory that the latter had supplied the plaintiff with an unsafe tool. The duty of the employer is to furnish tools that are ordinarily and reasonably safe for the character of the work they are intended for. It is not a duty to furnish the newest or best. In *Fischer v. Cape Girardeau*,[13] the court held that a shovel with a worn edge was not necessarily an unsafe tool under this rule, since a shovel with a worn edge is not inherently dangerous and, unless subject to use not ordinarily intended, such condition would not reasonably be anticipated to cause injury, although the worn edge might increase the amount of labor expended in doing work. Here the employee

12. 132 S. W. (2d) 1015 (Mo. 1939).
13. 131 S. W. (2d) 821 (Mo. 1939).

was shoveling frozen crushed rock with the worn shovel which slipped, resulting in the employee being thrown against the shovel handle, causing the injuries. The evidence was held insufficient to make a submissible case. In *Choate v. Springfield*,[14] the negligence was alleged to consist in the furnishing by the employer of an improper and unsafe tool for breaking rocks. The tool furnished was a flat faced hammer intended for use in striking stakes, drills or chisels, whereas the plaintiff alleged that a round or bulging faced hammer was the proper tool to use, due to the great reduction thereby in the amount of flying slivers. The evidence was held sufficient to take the question to the jury, but the case was reversed and the cause remanded for erroneous instructions, one of which placed the burden on the defendant of proving the existence of such common usage and knowledge in the rock-breaking trade of that kind of tool.

B. *Breach of duty established through violation of statute*

The duty and breach of duty which constitute negligence may be shown through violation of a statute which was intended to protect persons of the class to which the plaintiff belongs against the kind of injury which he has received. The only cases falling under this category involved the Federal Safety Appliance Act. In *Wilson v. Thompson*,[15] in an action for the death of a member of a train crew in a railroad switching movement, the plaintiff's witnesses testified that they saw the deceased riding the leading moving car and jerking the lever of the pin lifter, and that he fell when the moving car struck standing cars. This was held sufficient to authorize a verdict for the plaintiff on the theory that the coupling device failed to function, and that the deceased fell from the car and was injured while he was attempting to adjust the coupler.[16] A recovery was based upon the same Act in *Conrad v. Baltimore & Ohio R. R.*,[17] where the plaintiff was injured when he was about to examine, as an inspector, the rubber hose air coupler in the air brakes system. As the coupler parted, the air pressure caused it to whip around with great violence and strike him on the head. The coupling parted before he touched it, and the evidence showed that it could not have come apart under pressure unless it was in some way defective. The defendant had contended that the provisions of the Act with reference to power or

14. 343 Mo. 935, 124 S. W. (2d) 1127 (1939).
15. 133 S. W. (2d) 331 (Mo. 1939).
16. The judgment for the plaintiff was reversed because the trial court did not give instructions submitting the defendant's theory of the case.
17. 133 S. W. (2d) 350 (Mo. 1939).

train brakes could not be violated with a standing train. Here the train was made up, the engine was attached to the cars, and it was past time for the train to have departed. Therefore, the train, and not the car, was the unit. In *Gieseking v. Litchfield & Madison Ry.*,[18] the injuries were caused by failure to furnish efficient handbrakes within the Act.

C. *Imputed negligence*

Where the issue was whether the agent was on a mission for the insurer at the time of the automobile accident in *Snowwhite v. Metropolitan Life Insurance Co.*,[19] proof that the agent made a collection in his territory two hours after the accident would not support an inference that a purpose of the agent's trip at the time of the accident was the collection, nor would it authorize the submission of the case as to the insurer's liability to the jury. In *Pesot v. Yanda*,[20] the agent of an insurance company caused injuries to a pedestrian as a result of the negligent operation of his own automobile while en route to the company's office to turn over the collection of the preceding day. Before going to the office he had taken his wife to her place of work which was in a direction opposite from that which he would have taken had he been going direct to his office. He had no business to transact on that trip for the company. However, at the time of the accident he had started from the place where he had taken his wife toward the company's office. But he had deviated from his regular route to such an extent that he was not acting within the scope of his employment, and the moment he headed back toward his employer's office he did not return to his employment, although he had money belonging to his employer in his possession to turn in at the time. It appears that he had deviated to the extent of thirteen or fourteen city blocks away from the place where his duty to the master called him.

In *Becker v. Aschen*,[21] where injuries were sustained by a motorist who slipped on an alleged oily grease rack step in descending from his automobile which he had driven onto the grease rack, the filling station was owned by the oil company but was leased to a lessee whose remuneration was on a commission basis. This did not preclude a finding that the oil company operated the filling station and that the lessee was its agent, since there was

18. 344 Mo. 672, 127 S. W. (2d) 700 (1939).
19. 344 Mo. 705, 127 S. W. (2d) 718 (1939).
20. 344 Mo. 338, 126 S. W. (2d) 240 (1939).
21. 344 Mo. 1107, 131 S. W. (2d) 533 (1939).

substantial evidence that the oil company reserved the right to control and did control the operation of the filling station business.

D. *Causation*

Assuming negligence on the part of the defendant to have been made out, there is still the question of causation to be determined. In *Lappin v. Prebe*,[22] the theory of the plaintiff's case was that the death of the deceased was caused by the defendant in negligently operating a trailor-tractor as to permit a part thereof to project over the shoulder along the pavement so as to strike the deceased while he was walking on the shoulder of the highway at night. But the nature of the deceased's injuries established that he was not killed in this manner and the causal connection was not established. The trial court, therefore, improperly granted a new trial after verdict for the defendants.[23] On the other hand, sufficient causal relationship was made out in *Wills v. Berberich's Delivery Co.*,[24] where the evidence showed that septicemia, originating in a boil on the employee's chin, was aggravated by the ten or twelve foot fall sustained by the employee while at work, causing it to spread, so that the fall was a contributing cause to the death. The defendant's theory was that the spread of septicemia from the boil may have been due to low resistance or disease as shown by the autopsy. But the respondent's experts testified that the spreading infection more probably resulted from the violent fall than from the other possible causes shown.

E. *Defenses in negligence cases*

Contributory negligence as a matter of law prevented a recovery from the alleged owners and operators of a building for injuries sustained when a scaffold collapsed, in *Mosely v. Sum*,[25] where a janitor who had been employed at the apartment building for more than twenty-five years, in constructing a scaffold to clean wallpaper, used as a support a stepladder which he knew was weak and had rusty braces and had been repaired with straps and rope. In *Senseney v. Landay Real Estate Co.*,[26] it was held that a tenant's use of the elevator after regular business hours, when an elevator

22. 131 S. W. (2d) 511 (Mo. 1939).
23. See Mullen v. Lowden, 344 Mo. 40, 124 S. W. (2d) 1152 (1939), where no causal relationship was shown between the alleged acts of negligence and the injuries sustained by a brakeman in falling off a train.
24. 134 S. W. (2d) 125 (Mo. 1939).
25. 344 Mo. 969, 130 S. W. (2d) 465 (1939).
26. 131 S. W. (2d) 595 (Mo. 1939).

operator was not provided, specifically authorized or specifically prohibited, was contributorily negligent as a matter of law, the evidence showing that he opened the elevator door, looked in, thought he saw the elevator, stepped in and fell down the elevator shaft.

Under the Federal Employers' Liability Act, contributory negligence is not a complete defense but operates only to diminish the damages. It is an affirmative defense and must be pleaded, unless it is conclusively shown by the plaintiff's own negligence. In *Sheehan v. Terminal Railroad Ass'n of St. Louis*,[27] in an action under this Act for the death of an employee, it was held that the issue of contributory negligence was not raised where the case was tried by the plaintiff on the theory that the defendant's negligence was the sole cause of the injuries and by the defendant on the theory that the employee's negligence was the sole cause of the injuries.

In *Becker v. Aschen*,[28] a motorist had driven his automobile onto a grease rack, and to descend from the rack used a step which was oil soaked causing him to slip and fall. In an action for the injuries sustained, it was held that he was not contributorily negligent, as a matter of law, because he did not turn around and hold onto the car while descending, where the condition of the step leading from the grease rack was not obvious to the motorist and there was no reason to expect danger.

The rule that one in going upon railroad tracks must look and listen for approaching trains was held, in *Willig v. Chicago, Burlington & Quincy R. R.*,[29] not applicable with strictness to persons who are lawfully at work on or about tracks as invitees of the railroad. Such persons need only keep such reasonable lookout for trains as is commensurate with the danger and consistent with the faithful performance of their work. It was not contributory negligence as a matter of law for the plaintiff not to look or to listen, where the railroad company's section foreman, who customarily had notified the employees on this job regarding the time of arrival of special trains passing on the track near the overpass, had informed the employees that special trains would pass about noon on the day in question, and the special train which killed the plaintiff passed about nine o'clock in the morning. Here the plaintiff had the right to rely on the information given regarding the time of the arrival of trains, if it was reasonable to do so, whether or not the foreman was acting within the scope of his authority as an agent of the railroad company.

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27. 344 Mo. 586, 127 S. W. (2d) 657 (1939).
28. 344 Mo. 1107, 131 S. W. (2d) 533 (1939).
29. 137 S. W. (2d) 430 (Mo. 1939).

The assumption of risk cases all had to do with sets of facts arising under the Federal Employers' Liability Act where the workmen were injured by trains. In *Evans v. Atchison, Topeka & Santa Fe Ry.*,[30] the plaintiff furnished substantial evidence that the defendant had established a custom and practice to warn trackmen and others of approaching trains, and that no sufficient warning was given the plaintiff. On defendant's demurrer to the evidence, where the plaintiff was struck from behind without warning in violation of this established practice and custom to warn, it was held that the plaintiff had the right to rely upon the giving of the customary warning signals and the court could not say as a matter of law that he had assumed the risk of being struck without warning. But an experienced section hand who was injured while assisting other members of a section crew in putting a motorcar on the railroad track from a set-off by the use of lining bars, who was familiar with the condition of the particular set-offs, and had assisted before in putting motorcars on the track by the same method, was held in *Arnold v. Scandrett*,[31] to have assumed the risk of injury which he received when the motorcar suddenly upkicked and struck him in the lower right abdomen, resulting in a direct inguinal hernia. Likewise, a trainman is held to assume the usual and ordinary handling of a train, especially when he rides in a more dangerous place as a matter of his own choice when a place of safety has been provided for him. In *Mullen v. Lowden*,[32] the plaintiff was the head brakeman and was thrown in some way from the tender where he was riding, and there was no evidence of any unusual handling of the train.

F. *Humanitarian doctrine*

Due to the significance of this doctrine in the Missouri decisions, this phase of Torts is given special emphasis as a special topic which will be found elsewhere in this issue of the *Review*.[33]

G. *Burden of proof*

There is still some oversight on the part of lawyers and trial courts in failing to follow the guidance which the court has attempted to provide in

30. 131 S. W. (2d) 604 (Mo. 1939).
31. 131 S. W. (2d) 542 (Mo. 1939).
32. 344 Mo. 40, 124 S. W. (2d) 1152 (1939).
33. Discussed by Mr. Becker.

the matter of instructions as to the burden of proof in the negligence cases.[34] The court in *Flint v. Loew's St. Louis Realty & Amusement Corp.*,[35] calls attention to the fact that "Recently we have written much on burden of proof instructions, indicating a preference for a short, simple instruction thereon. . . ." The court therein sets forth again a considerable discussion on the problem. Space is inadequate here to set forth in detail the instructions involved in the cases during this period on the burden of proof. In *Snowwhite v. Metropolitan Life Ins. Co.*,[36] an instruction informing the jury that the defendants were charged with a positive wrong, and that a recovery could be had on a charge of negligence only where sustained by the greater weight of the credible evidence to the reasonable satisfaction of the jury that the charge was true, and had been explicitly condemned by the court in earlier cases. Instructions on the burden of proof, in *Williams v. Guyot*[37] and *Branson v. Abernathy Furniture Co.*,[38] fell within the accepted scope.

II. Assault and Battery

In an action against a sheriff and the surety on the sheriff's bond for damages for battery alleged to have been committed by a deputy sheriff, the court, in *State ex rel. Donelon v. Deuser*,[39] held not inconsistent plaintiff's instruction, authorizing a recovery if the deputy used more force under the circumstances than was reasonably necessary to arrest, and an instruction given for the defendant that the deputy had the right to use such force as appeared to him at the time to be reasonably necessary to overcome resistance by the plaintiff. The court also held that these were not unfavorable to the defendants. The latter ground is sound enough but on the question of inconsistency there may easily be some doubt. There would seem to be a considerable difference between the reasonableness of the force used when viewed objectively (plaintiff's thory), and when viewed subjectively (defendant's theory). The court also held that the jury may consider the sense of shame, mental suffering, humiliation, mortification, wrong or outrage which the plaintiff suffered or would suffer as the direct result of the

34. See this development in McCleary, *The Work of the Missouri Supreme Court for the Year 1936* (*Torts*) (1937) 2 Mo. L. Rev. 467, 480; (1938) 3 *id.* 420, 433; (1939) 4 *id.* 437, 448.
35. 344 Mo. 310, 126 S. W. (2d) 193 (1939).
36. 344 Mo. 705, 127 S. W. (2d) 718 (1939).
37. 344 Mo. 372, 126 S. W. (2d) 1137 (1939).
38. 344 Mo. 1171, 130 S. W. (2d) 562 (1939).
39. 134 S. W. (2d) 132 (Mo. 1939).

battery, although the plaintiff did not seek punitive damages. Due to the severity of the damages, a verdict for $15,000 did not seem to be grossly excessive.

III. False Imprisonment

In *Ussery v. Haynes*,[40] the county court's determination that notice, not legally served, of an insanity hearing was given to the alleged insane person before rendition of final judgment committing her to the state hospital as a county patient, was held to be error in the exercise of its judicial function for which the circuit judges cannot be held liable in damages for false imprisonment. Neither was the county physician who took no part in the actual commitment of the plaintiff to the hospital, though he testified as a witness at the sanity hearing and made out a certificate, required by statute to be transmitted to the hospital superintendent, at the court's behest, nor the county clerk who issued through his deputy notice to the plaintiff, which was based upon sufficient information, and who issued the warrant of commitment as required by statute based upon the county court's judgment which was fair and sufficient on its face.

An instruction, authorizing a verdict for punitive damages in an action for false imprisonment only if the jury found the acts of the defendants which caused the arrest of the plaintiff were willful and without just cause or excuse, was held in *Newport v. Montgomery Ward & Co.*,[41] not to be a roving commission to assess punitive damages. This on the ground that if the acts of the defendant caused the arrest of the plaintiff and the arrest was made without probable cause and through malice, punitive damages were authorized.

IV. Malicious Prosecution

In *Bonzo v. Kroger Grocery & Baking Co.*,[42] the circuit court, juvenile division, after a hearing, had entered its findings and orders, stating that there was probable cause to believe the defendant guilty of the charge of robbery as charged in the information and ordering that the defendant be held to await the action of the grand jury. A subsequent judgment of the same court finding the accused not guilty was held to be of no probative effect as to the issue of probable cause for prosecution.[43]

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40. 344 Mo. 530, 127 S. W. (2d) 410 (1939).
41. 344 Mo. 646, 127 S. W. (2d) 687 (1939).
42. 344 Mo. 127, 125 S. W. (2d) 75 (1939).
43. For the troublesome experience of this question in the Missouri decisions, see (1939) 4 Mo. L. Rev. 78.

TRUSTS

W. L. NELSON, JR.*

Of the eight Missouri Supreme Court cases for the year 1939 dealing with trust law, one is of special interest. This decision, *Rossi v. Davis*,[1] involved the validity of a clause providing for forfeiture in the event of contest by a beneficiary and seems to be the first case in Missouri upon which such a provision in a trust instrument has been passed. In the other opinions digested here, the court applied only well-established principles of the law.

I. EXPRESS TRUSTS

A. *Appointment and removal of trustee*

The appointment by a court of a successor trustee was under attack in *Riggs v. Moise*.[2] One Lionel Moise, named as a co-trustee by the testator, filed an *ex parte* petition in Division Three of the Jackson County Circuit Court asking that the court appoint him trustee so that he might take charge of the property. A decree to that effect was entered. Later he resigned and his wife, Daisy C. Moise, was appointed trustee by the same division. After his death the beneficiaries instituted this suit, alleging that the trusteeship was vacant as a result of the death of the named trustee, that the appointment of the successor trustee by Division Three was a nullity, and asking that the court appoint a trustee to succeed Lionel Moise. Division Four to which the case was assigned, did enter such a decree, but a year later sustained a motion filed by Daisy Moise and held that its prior orders were void, inasmuch as Division Three had exclusive jurisdiction.

On appeal by the beneficiaries, the supreme court held that Division Three never acquired jurisdiction over the trust estate and that its purported appointment of the trustee who had been named in the will, such procedure for confirmation not being a condition precedent to a trustee entering on his duties, was void.

The court also stated that the trustee's resignation was a nullity, not

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*Attorney, Columbia. A.B., University of Missouri, 1933, LL.B., 1936.

1. 133 S. W. (2d) 363 (Mo. 1939).

2. 344 Mo. 177, 125 S. W. (2d) 632 (1939).

only because of the lack of jurisdiction but also because the beneficiaries were not notified of the trustee's application to resign, nor was their consent obtained. The court stated that a trustee having once accepted the trust and entered upon its management could not resign except "(a) by proceedings before a court having jurisdiction over the trust; or (b) in accordance with the terms of the trust; or (c) with the consent of all the beneficiaries, if they have capacity to give such consent."[3]

This question of jurisdiction was also referred to in *State ex rel. Caulfield v. Sartorius*,[4] where the contention was made that the court did not have jurisdiction, all the beneficiaries not appearing and no process being issued, the only notice given being the publication in the court's official newspaper of the docketing of the motion. That question was not passed on but the court did say that the beneficiaries are entitled to be heard, and that the appointment or removal of a trustee cannot be done arbitrarily.

The validity of an order of the respondent circuit judge removing relator as a co-trustee was under attack in that case. The lower court found that this trustee had failed to take any action to compel his co-trustee, a bank, to account for losses due to its alleged mismanagement prior to his appointment, a number of beneficiaries having previously filed suits charging the bank with mismanagement of the trust fund, and further found that he had accepted $10,000 from the bank as compensation in addition to that which the bank had been ordered to pay under the terms of the decree providing for his appointment. The circuit court, in its hearing on the motion, had excluded evidence that the additional payment was within the reasonable value of the services rendered, and had then found that the acceptance of the additional payment tended to impair the trustee's independence and to place him under obligation to the bank.

After issuing a preliminary rule prohibiting respondent from enforcing his order, the supreme court made the rule absolute, holding that the facts found by the lower court were not sufficient to justify the trustee's removal. First pointing out that he had been appointed with instructions to act with the bank, at a time when all the charges were pending against it, and was therefore not remiss in failing to proceed against the bank for alleged mismanagement, the court held that his failure to secure the court's approval for the receipt of additional compensation did not justify his removal. The court pointed out that it was neither alleged nor found that the payment

3. *Id.* at 184, 128 S. W. (2d) at 635.
4. 344 Mo. 919, 130 S. W. (2d) 541 (1939).

was in excess of the reasonable value of services rendered, and quoted with approval from two cases holding that a trustee would not be removed unless it were clearly necessary to do so in order to save the trust property.[5]

B. *Action against trustee*

In re Howard's Estate v. Howe,[6] was an appeal from a judgment dismissing a claim against the estate of a decedent. The supreme court, finding that the claim was contingent, said that if the estate should be considered, because of a certain agreement, to be standing in the position of a trustee, the proceeding was analagous to an action by a beneficiary against his trustee for money had and received, and that the general rule is that such an action cannot be maintained until there has been a final settlement of accounts and nothing remains for the trustee to do but pay over the amount found to be owing.

In *State ex rel. Lee v. Sartorius*,[7] involving the same trust arrangement dealt with in *State ex rel. Caulfield v. Sartorius*, the court held that the members of a committee formed to protect the rights of the beneficiaries who became parties to an extension agreement were not trustees, as found by respondent judge, but were merely agents for the beneficiaries who became parties to the agreement, and that they could not be removed and enjoined from acting on the committee. The court pointed out that the extension agreement provided a method for the beneficiary's withdrawal, and that if such method were inequitable, resort could be had to a court of equity, but that the court would not, at the request of one person, revoke an agency for others against their wishes.

C. *Legality of no-contest clause*

Rossi v. Davis involved six different appeals arising out of an action

5. In Wiegand v. Woerner, 155 Mo. App. 227, 264, 134 S. W. 596, 608 (1911), the St. Louis Court of Appeals said: "To remove one as trustee there must be a clear necessity for such act, a clear necessity for it, in order to save the trust property." The court also quoted the following from Mississippi Valley Trust Co. v. Buder, 47 F. (2d) 507, 511 (C. C. A. 8th, 1931): "'In no case ought the trustee to be removed where there is no danger of a breach of trust and some of the beneficiaries are satisfied with the management. Nor will a trustee be removed for every violation of duty, or even breach of trust, if the fund is in no danger of being lost. The power of removal of trustees appointed by deed or will ought to be exercised sparingly by the courts. There must be a clear necessity for interference to save the trust property. Mere error, or some breach of trust, may not be sufficient; there must be such misconduct as to show want of capacity or of fidelity, putting the trust in jeopardy.'"

6. 344 Mo. 1245, 131 S. W. (2d) 517 (1939).

7. 344 Mo. 912, 130 S. W. (2d) 547 (1939).

wherein trustee sought the direction of the court as to certain questions regarding the administration of the trust. The trust instrument provided for the payment of the income from the trust to the beneficiaries, who were the creator's wife, children, and a grandson, and to their descendants, and on the death of the last of the named beneficiaries, the corpus was to vest in certain parties. The instrument contained a no-contest clause providing that if any of the named beneficiaries instituted any action to set aside the trust, then his interest and that of his descendants should cease and his original share should go to the other named beneficiaries.

After the death of the settlor one of the daughters, a beneficiary, had herself appointed administratrix of his estate and instituted a proceeding to discover assets, the only assets being property which had been transferred to the trustees by the instrument in question. In that proceeding the validity of the trust instrument was attacked, and in the present action the trustees asked the court to direct them as to whether there had been a forfeiture under the no-contest clause. The daughter argued that the no-contest clause should not be applied where there appeared to be probable cause for the contest.

The court was not cited to any case construing a forfeiture provision in a trust instrument, but it reviewed will cases in which similar provisions were under consideration, and applying the principles which apparently were adopted in *In re Chambers' Estate*,[8] and which were enunciated by the Supreme Court of the United States in *Smithsonian Institution v. Meech*,[9] the court stated that such a clause was valid and enforceable, and that no exception as to probable cause should be allowed where the creator had not so provided. The court further found that the daughter had violated the provision by instituting the probate court proceedings, even though she was acting as administratrix there, because as an heir and distributee she had a personal interest in having the instrument set aside.

It was not necessary in this case to decide whether a no-contest provision would be enforced where the trust instrument did not provide for a gift over, but the court did point out that some courts made such a distinction.

The court also took up the matter of certain alleged acts of malfeasance on the part of the trustees, but found no ground for removal.

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8. 322 Mo. 1086, 18 S. W. (2d) 30 (1929).
9. 169 U. S. 398 (1898).

II. Implied Trusts

Sufficiency of proof

In holding that the defendant in *Tichenor v. Bowman*,[10] had failed to establish an implied trust in certain real estate which had been conveyed to the defendant's husband and another individual, the purchase money allegedly being the wife's separate property, the court followed the well-established rule that "an extraordinary degree of proof" is required to establish an implied trust, and that the evidence must be "so clear, positive, and convincing as to exclude every reasonable doubt from the chancellor's mind."[11]

WILLS AND ADMINISTRATION

Ozbert Watkins, Jr.*

Any selection of the decisions involving the subject of wills and administration must of necessity be somewhat arbitrary due to the broad nature of the subject. Numerous cases digested under the general topic of wills can just as appropriately be said to deal with other fields of law such as Property, Trusts, Taxation, etc. The fifteen cases herein discussed are those that, in the opinion of the writer, could more appropriately be dis-

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10. 133 S. W. (2d) 324 (Mo. 1939).

11. In the other two cases decided last year, the court merely touched on the law of trusts. Fullerton v. Fullerton, 132 S. W. (2d) 966 (Mo. 1939), was a suit by certain heirs of a testator against the other heirs to adjudge title to real estate and partition it. The testator had directed that a sum of money be loaned on real estate and that the interest be paid to a daughter until her death, at which time the principal should be distributed to his heirs. The plaintiffs alleged that one of the defendants had invested the money in the real estate in question, contrary to the directions in the will, and had taken title in the name of the daughter, and that she later purported to devise and convey the land to that defendant. On appeal, the court found that such was the fact and it held that the plaintiffs were entitled to recover, whether the money was invested under the terms of the will, or whether it was invested without authority from the testator, for in the latter case a resulting trust would arise.

In Loehr v. Glaser, 133 S. W. (2d) 394 (Mo. 1939), the court, construing a clause of a will under which property was devised to named trustees for the use of certain beneficiaries with directions that the trustees should, within two years after final settlement of the estate, sell the property and distribute the proceeds, held that legal title vested in the trustees on the death of the testator, as opposed to the only heir's contention that the clause provided that the trust should not be created on the date of the death of deceased but should be created after administration, and was therefore void.

*Attorney, St. Joseph, LL.B., University of Missouri, 1939.

cussed under the subject of wills and administration than any other topic, but are not the only cases involving wills that were considered by the court.

I. CONSTRUCTION

In re Knighten's Estate[1] reasserts the rule that the lapse statute[2] does not apply to save a gift to a spouse. In that case it was contended that Section 306, Missouri Revised Statutes, 1929, relating to descent and distribution, included the spouse, and that this defined "kindred" or "relative" to include relatives by affinity. The court, however, overruled this contention, and followed the rule above set out.

Gregory v. Borders, and *Shields v. Borders,*[3] are consolidated cases and were suits to construe a will. The testator gave his half-brothers $1.00 each, and all of his real estate to his wife. He also left the residue of his estate to his wife "to hold to her and her heirs forever." All of the beneficiaries predeceased the testator. It was contended by the wife's relatives that the will showed an intent to disinherit his half-brothers and to leave the testator's entire estate to his wife. It was further contended that the testator had stated after execution of the will that he had fixed it so that his wife's relatives would get his whole estate. The court reasserted the rule that the lapse statute did not apply to save the wife's bequest as she was not a "relative" of the testator within the meaning of the statute and for the further reason that she left no lineal descendants. After stating the usual rules concerning the testator's intention, the court went on to hold that they could not indulge in the presumption that he intended to exclude his relatives in the event that his wife predeceased him. It was also contended that the words "to her and her heirs" were words of substitution, but the court properly held that they were words of limitation and that the estate descended to the heirs of the testator.

In *Fullerton v. Fullerton,*[4] the will bequeathed all of the testator's cash to his daughter, Mary Jane, to be loaned at interest, the interest to be paid to his daughter annually for her life, "and in case of her death then said amount to go to her children, and in case she dies without children living then said sum of money is to be paid to my heirs." The court held that Mary Jane took a life estate under the will and as she had no children

1. 344 Mo. 246, 125 S. W. (2d) 863 (1939).
2. MO. REV. STAT. (1929) § 527.
3. 136 S. W. (2d) 306 (Mo. 1939).
4. 132 S. W. (2d) 966 (Mo. 1939). See also the discussion of this case in (1940) 5 MO. L. REV. 236.

the remainder would descend to the heirs of the testator. This was so even though no trustee was named in the will.

The will in *Loehr v. Glaser*,[5] devised all of the testator's property to trustees and then provided: "It is my desire . . . that my said trustees shall, within two years after the final settlement of my said estate sell various pieces until all of said property . . . shall have been converted into cash." After the sale there was to be a distribution. The trust was to terminate within two years after the final settlement of the estate. It was contended that no trust was created for the reason that the trust was not to commence until after administration.[6] However, the court held that immediately upon the death of the testator the clause in question vested an estate in the trustee's named and that the trust was created at that time.

Masterson v. Masterson[7] was a suit for the construction of a will. The plaintiffs were the brothers and sisters of the testator. The will read: "All the rest . . . of my estate . . . to my beloved wife . . . absolutely so long as she remains my widow." The will made no further provision. The court first held that the plaintiffs might invoke the jurisdiction of a court of equity to construe a will affecting personal as well as real property and to protect them against waste, dissipation, and conversion of the corpus by the life tenant. The court then reviews many authorities and construes the will as giving the widow a life estate without power to dispose of the remainder. The reasoning in the case of *Underwood v. Cave*,[8] is expressly overruled. The court states that the word "absolutely" indicates that the estate for widowhood exists without limitations imposed upon its enjoyment in other parts of the instrument.

II. Contest of Wills

The case of *Rossi v. Davis*,[9] involves an *inter vivos* trust, but many of the principles therein set forth apply as well to wills as to trusts. The suit was instituted by the trustees of Simon D. Rossi, now deceased. The plaintiffs,

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5. 133 S. W. (2d) 394 (Mo. 1939).
6. It is rather difficult to tell from the opinion what the contention of the parties was. See, for example (1940) 5 Mo. L. Rev. 361, where it is suggested that the heir at law was contending that the trust was not to commence until two years after the final settlement and that, therefore, there was a violation of the rule against perpetuities. It would seem that if the trust were not to commence until two years after final settlement that the rule against perpetuities would have been violated, unless the fact that the distribution was to be to a charity would prevent the operation of the rule. This matter, however, is not discussed by the court.
7. 344 Mo. 1188, 130 S. W. (2d) 629 (1939).
8. 176 Mo. 1, 75 S. W. 451 (1903).
9. 133 S. W. (2d) 363 (Mo. 1939).

by their petition, sought the direction of the court as to certain questions relating to the administration of the trust. The settlor, prior to the creation of the trust, formed a corporation to which, before he died, he transferred all his property. The trust instrument conveyed to the trustees all of the stock of this corporation, but reserved the right to direct the voting of the stock during his lifetime. There is no contention that Rossi was not of sound mind and free from undue influence when he executed the trust instrument. The trust, generally speaking, provided for the payment of the income to certain beneficiaries. The instrument also contained a "no contest" or incontestibility clause to the effect that if any of the beneficiaries instituted any proceedings of any kind, at any time, for the purpose of setting aside this instrument, and were unsuccessful therein, then such contesting parties should receive the sum of $1.00; that all further interest of such contesting party should cease; that such party and his or her children and descendants should share no further in the trust, but their interest should be transferred to the other beneficiaries. The settlor died thereafter leaving no other assets and no debts or creditors. Theresa Davis, a daughter of the settlor and one of the defendants, expressed dissatisfaction with the trust instrument and indicated an intention to break the trust. She procured her appointment by the probate court as administratrix of her father's estate and purportedly in that capacity instituted a proceeding in the probate court to discover assets of her father. In said proceeding the only assets discovered were the shares of stock in the Rossi Corporation, all of which the settlor had transferred to his trustees prior to his death if the trust instrument were valid. In effect, therefore, the proceeding to discover assets attacked the validity of the trust instrument and sought to recover from the trustees the shares of stock which had been conveyed thereby.

After an appeal to the supreme court the validity of the trust instrument was upheld,[10] and the present action followed. The first question for decision was whether or not Theresa Davis had violated the "no contest" provision of the trust instrument, and if so, whether or not she lost all of her interest in the trust estate. The court, in its decision, reviews many authorities and relies to a great extent on *Rudd v. Searles*.[11] The court then reconsiders the case of *In re Chambers Estate*,[12] and construes the *Chambers* case as holding that probable cause for a will contest does not relieve from

10. Davis v. Rossi, 326 Mo. 911, 34 S. W. (2d) 8 (1930).
11. 262 Mass. 490, 160 N. E. 882 (1928).
12. 322 Mo. 1086, 18 S. W. (2d) 30 (1929).

a forfeiture provided in an incontestibility clause. The court then follows the holding of the *Chambers* case as it is so construed, and holds that the incontestibility clause is valid and binding regardless of whether or not there was probable cause for the contest. The court did not decide whether or not there was probable cause here as they said that it made no difference. The holding indicates that the "no contest" provision would have applied even if there had been no gift over in case of a contest, although it is recognized that there is considerable difference in the authorities as to whether or not a "no contest" provision does apply where there is no gift over. This is *dictum*, however, as here there was in fact a gift over. The court then holds that the proceeding to discover assets, instituted in the probate court, was in effect a contest of the trust as it brought into question the validity of the trust instrument. It was contended that as Theresa Davis had instituted the probate proceeding as administratrix she had not violated the "no contest" clause or, in other words, that her contest as administratrix should not be considered a contest by her in her individual capacity. The court overruled this contention, stating that she was bound by the result and would have received benefits in her individual capacity had the contest been successful, and further held that her husband and children were barred from any interest in the trust estate for the reason that they were to take upon her death only what she would have received had she been living. In view of the fact that after the contest she had lost her entire interest in the estate, the husband and children lost their interests also. The court then went on to consider some important questions concerning trusts that have no place in this discussion.

Idle v. Moody,[13] was a statutory will contest case. Testatrix executed a will, making several specific bequests and devises, and thereafter devised all of the remainder of her property to certain named persons. Later testatrix executed a codicil, giving a certain note secured by deed of trust and "all the rest, residue, and remainder of my estate . . . which remains after the payment and settlement of all specific bequests and devises made in my will dated the 19th day of January, 1935, to be held . . . and to pay the income thereof to my grand-son Carroll Pettefer . . ." The ground for the contest was that the residuary clause in the codicil was made by mistake. None of the usual grounds of a will contest were relied upon. Testamentary capacity was admitted, and fraud and undue influence were specifically disclaimed. A proper execution of the codicil was also admitted.

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13. 344 Mo. 694, 127 S.W. (2d) 660 (1939).

The court stated that they assumed, without deciding, that substantial evidence tending to show that the codicil was executed under the circumstances alleged would sustain a finding against it, nevertheless the evidence was insufficient. The contestant called as a witness the attorney who had executed the codicil. He testified that it was the first codicil he had ever drawn, and by a series of "yes, sir" answers, testified that he was not instructed as to the disposal of the residuary estate; that he did not know why he wrote the residuary provision into the codicil; that he did not know the meaning of the words "rest, residue and remainder;" and that the first time he knew that the codicil bequeathed any more than the note and deed of trust was when it was suggested to him, after the testatrix's death. There was other evidence by various persons that the codicil was executed by a mistake. The testimony of the attorney was largely relied upon. There was a conflict in the evidence as to whether or not the testatrix knew the contents of the codicil before she signed it, but there was substantial evidence to the effect that she read it over before signing it. The attorney also testified that when he told testatrix to execute the codicil he also told her that it was written in accordance with the instructions which she had given him. The trial court found against the contestants, which judgment was affirmed by the supreme court. The court then cites among other authorities the case of *In re Gluckman's Will*,[14] for the purpose of showing that it is against public policy to permit a pure mistake to defeat the competent testamentary act, and further states that it is more important that the probate of wills be shielded from the attacks of fictitious mistakes than that it be purged of wills containing a few real ones.

The only will contest involving the mental capacity of the testator was the case of *Whitacre v. Kelly*.[15] In that case there was no dispute but that the testatrix was of sound mind up to June 25. The will was executed on June 27. Several witnesses expressed the opinion that the testatrix was unconscious when they saw her on the day that the will was executed and on a day or two prior thereto and the week following the execution of the will. Most of these witnesses, however, said that upon speaking to the testatrix she responded by moving her lips or making a noise in her throat. The evidence further disclosed that the testatrix was suffering from cancer at the time of the execution of the will and died the following week. The proponents introduced evidence that the testatrix was of sound mind at the

14. 87 N. J. Eq. 638, 101 Atl. 295 (1917).
15. 134 S. W. (2d) 121 (Mo. 1939).

time of the execution of the will. Her attending physician testified that the medicine he gave her would not affect her mental faculties; that he talked with her several times a day from June 25 until her death and at each time she talked rationally and was rational at the time the will was executed. The court took judicial notice of the fact that a person could be conscious one minute and unconscious the next and decided that the proponents had made a *prima facie* case which there was no substantial evidence to rebute. The trial court, which had set aside the will, was reversed.

III. Homestead and Rights of the Surviving Spouse

The leading case dealing with the rights of a surviving spouse is *Merz v. Tower Grove Bank & Trust Co.*[16]

The facts were that one Julius Merz conveyed over $300,000.00 to himself and defendant trust company, as trustees, with power to manage the fund and pay the entire income to the settlor for life, and thereafter $200.00 per month to his widow for life, and $200.00 per month to Adolph Merz for life, with other provisions for disposition of the fund on the death of either the widow, who is the plaintiff here, or Adolph Merz. After the death of the above beneficiaries, the corpus of the estate was to be conveyed to other named persons. The settlor also reserved the right to revoke the trust at any time, and to add other assets to the trust.

At the time of the creation of the trust the settlor was very ill and knew that he did not have long to live. There was evidence that he had voiced a desire to fix his estate so that his wife would not have over $200.00 per month, and that he had been told that he could not so limit his wife by will but could do it by this trust agreement. The trust instrument was drawn up by the trust officer of the defendant trust company. On the same day that the trust instrument in question was executed, Julius Merz also executed a will bequeathing the residue of his estate to Adolph Merz (one of the defendants herein) in trust, to divide the income equally between plaintiff (the widow) and Adolph Merz, and further provided that if plaintiff renounced the will the trust would be void. This will revoked a prior will that Julius Merz had executed for the purpose of defeating plaintiff's marital rights. Plaintiff filed this suit to set aside the conveyance in trust and recover one-half of the assets on the ground that it was in fraud of her marital rights and was testamentary in character. Adolph Merz filed an answer in the nature of a cross-bill admitting the facts set

16. 344 Mo. 1150, 130 S. W. (2d) 611 (1939).

forth in the petition and made several other similar charges in addition thereto. Defendant trust company filed a general denial and set up other additional facts. Deceased died within a few days after execution of the trust and will, and plaintiff filed her election renouncing the will.

The court held that they would defer to the findings of the trial court that the deceased created the trust with the intent and purpose of defeating plaintiff's marital rights. The court also held that the public policy of the state as evidenced by Missouri Revised Statutes, 1929, Sections 325, 327, and 333, is that when a husband dies without a child or descendant entitled to inherit, his widow shall be entitled to half of the real and personal estate belonging to the husband at the time of his death, absolutely, subject to payment of the husband's debts. Further that a conveyance by the husband with the intent to defeat his wife's marital rights was a fraud upon said widow and she could sue and set aside such fraudulent conveyance and recover the property so fraudulently transferred, to the extent of her interest therein. Defendant trust company argued that as the trust was made up of personalty, the wife had no rights in and to the personal property except that vested in the husband at the time of his death; that he could dispose of his property by gift or otherwise free from any claims by his wife; that to hold otherwise would paralyze commerce and trade for the reason that a husband in poor health would be afraid to undertake to arrange his affairs or dispose of his goods for fear that the wife would follow every transaction and void it. The court held, however, that this had been the rule for many years and that there had been no noticeable paralysis of commerce resulting therefrom. The contention was also made that as Adolph Merz was executor of the estate and an heir, he had no capacity to maintain a cross-bill as the results might be beneficial to the heirs and legal representative of a fraudulent grantor. The court reviewed the facts and stated that the trust officer knew or should have known that the trust was certain to fail. The court said in this regard that it would be a greater wrong to permit the transferee to hold the property than to permit recovery by the heirs of the deceased, and that therefore they may recover, notwithstanding the fraudulent purpose of the deceased in executing the trust. The entire trust was held void as being an attempt to defeat the marital rights of the widow, and as testamentary in character.

A very interesting case is *Lee's Summit Building & Loan Assn. v. Cross.*[17] There the plaintiff claimed title to land through one F. C. Cross,

17. 134 S. W. (2d) 19 (Mo. 1939).

the widower of Anna Cross, who owned the land. Anna Cross died testate in California leaving a will which was filed there. F. C. Cross did not renounce this will, but filed an election in Missouri to take a child's share of the land in question. The court held that a timely renunciation of the will would have nullified the devises of real estate to others and endowed the surviving spouse with common law dower, and after such renunciation a timely election would have vested the spouse with a child's share. However, as there had been no renunciation here, the court held that there was no right of election, and that the other devises remained. The court said further that it seemed that the purported election was to take all that the will gave and in addition a child's share, which could not be done under Missouri law.

The case of *Stanton v. Leonard*,[18] was a suit to quiet title. One Reynolds, who was the common source of title, died intestate. It was conceded that the widow had a homestead in the real estate, and that there were three children. The widow elected to take a child's share as provided in Missouri Revised Statutes, 1929, Section 328. It was contended that the widow took the property as homestead property under Missouri Revised Statutes, 1929, Section 612, and that each of the three children took a one-third interest in fee subject to the widow's homestead, and that the election by the widow could not affect the interest of the children, because the widow was not entitled to "election dower" when the only property was her homestead property. The court held, however, that the widow could take a child's share in this property absolutely subject to her homestead in the entire property.

In *Kay v. Politte*,[19] the court overrules the case of *Kelley v. Parman*,[20] and holds that an adult son holding an interest in land subject to the homestead rights of his mother and minor brothers and sisters can convey his interest, and his interest can be sold under execution.

The case of *In re Bernay's Estate*,[21] is a leading case, but deals largely with questions of taxation. The court, however, reaffirms the well-known principles that where a will provides for a widow in lieu of dower, and she takes under the will, she waives her statutory rights as widow. The court also states the statutory rule that where a widow takes a child's share of

18. 344 Mo. 998, 130 S. W. (2d) 487 (1939).
19. 344 Mo. 805, 129 S. W. (2d) 863 (1939).
20. 282 S. W. 755 (Mo. App. 1926).
21. 344 Mo. 135, 126 S. W. (2d) 209 (1939).

personalty, she takes it subject to debts, overruling language to the contrary in *In re Rogers' Estate.*[22]

IV. MISCELLANEOUS

Ver Standig v. St. Louis Union Trust Co.,[23] was a suit for specific performance of an oral contract to devise real estate. The consideration for the contract was services rendered by the plaintiff's husband. Cora Leon, the deceased, married one Weil, and upon her death, Weil, as surviving spouse, elected to take one-half of the property subject to debts. The trial court found for the defendant. The supreme court reversed the decision as against the weight of the evidence, but held that the one-half which the husband took subject to debts was not subject to the contract as the contract was not a debt. The holding that this one-half taken by the husband was not subject to the contract is weakened some by the court in stating that there was no evidence that Weil (the husband) had knowledge of the contract, and that when Weil married Cora Leon, the plaintiff was charged with knowledge that he would have an interest, and for the further reason that when Weil exercised his right, the plaintiff filed a claim in *quantum meruit* to recover for the services rendered. The court seems to reach its decision by balancing the equities.

The case of *In re Howard's Estate v. Howe,*[24] involves the allowance of contingent claims against an estate. The claimant had filed a suit in the federal court asking for an accounting against a corporation because of the use of a patent that claimant contended was his. The claimant was successful in that suit in the federal court, and the court had ordered an accounting and held that the corporation was trustee of the profits for the plaintiff. The corporation had been dissolved and the committee in charge of the assets distributed them with the agreement that the distributees, if necessary to pay claims, would "kick back" their pro rata share. The defendant estate was one of these distributees, and this claim for $4,000,000.00 was presented against it. The court held that as the accounting pursuant to the decree of the federal court was incomplete, the claim was contingent, and an uncertain or contingent claim is not enforceable against an estate in a probate court. The fact that an arbitrary amount based on a partial accounting is set up does not prevent the claim from being contingent. The

22. 250 S. W. 576 (Mo. 1923).
23. 344 Mo. 880, 129 S. W. (2d) 905 (1939).
24. 344 Mo. 1245, 131 S. W. (2d) 517 (1939).

court went on to say that if this were considered a suit to trace equitable funds into the estate, the demand was properly dismissed for the reason that a probate court has no jurisdiction to entertain a suit lying wholly in equity.

WORKMEN'S COMPENSATION

JAMES A. POTTER*

During the year the court considered sixteen cases in which some question of interpretation of the Compensation Act was involved.[1] Only a portion of the cases decided deserve extended comment.

I. WHO IS AN EMPLOYEE?

Three cases decided during the year turned on the court's view of Section 3305(a).[2] The first, *Sayles v. Kansas City Structural Steel Co.*,[3] considered this set of facts: Widow filed claim for compensation, alleging her deceased husband's wage was $78.00 per week. From 1922 to 1934 Sayles had worked most of the time, being paid for actual time worked. In June, 1934, he was put on the payroll at $78.00 per week, whether he worked or not, and continued on this basis until his death in 1937. The Commission denied compensation on the ground Sayles was excluded by Section 3305.[4]

In affirming the award of the Commission the court overrules *Klasing*

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*Attorney, Jefferson City. A.B., University of Missouri, 1902, LL.B., 1905.

1. This is a considerable increase over the number before the court in 1938 (four). During 1939 five cases came before the court for review on *certiorari*, ten on direct appeal where more than $7500 was involved, and one on the constitutionality of a statute.

2. Workmen's Compensation Act, MO. REV. STAT. (1929) c. 28. "Sec. 3305. Certain terms defined. (a) The word "employe" as used in this chapter shall be construed to mean every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election, but shall not include persons whose average annual earnings exceed three thousand six hundred dollars. Any reference to any employee who has been injured, shall, when the employe is dead, also include his dependents, and other persons to whom compensation may be payable. The word "employe" shall also include all minors who work for an employer, whether or not such minors are employed in violation of law, and all such minors are hereby made of full age for all purposes under, in connection with, or arising out of this chapter."

3. 344 Mo. 756, 128 S. W. (2d) 1046 (1939).

4. One Commissioner dissented on the authority of Klasing v. Schmitt Contracting Co., 335 Mo. 721, 73 S. W. (2d) 1011 (1934).

v. Schmitt Contracting Co.[5] The *Klasing* case had declared that the exclusion provision of Section 3305(a) was meant to apply only to employment under a contract for a definite term of one year or more at a salary in excess of $3600.00.

In the *Sayles* case the court takes the position that such was not the intention of the legislature. The words "under any contract of hire, express or implied" would not have been placed in the section if the legislature had intended to require a definite term of years.[6]

State ex rel. Mills v. Allen,[7] was brought before the court on *certiorari* as conflicting with the *Klasing* case. In the *Mills* case, claimant was an officer of the company at a salary in excess of $3600.00 per year under written contract. By-Laws provided officers could be removed at any time by action of the Board of Directors. Claimant's contention was that employment was terminable at any time; hence, not under contract for a year or more.

The court follows the *Sayles* case, which was handed down at the same term, and affirms the award, holding claimant not an employee within the Act.[8]

The third case involving this question is *Morse v. Potosi Tie & Lumber Co.*[9] Appellant's theory in this case was (on authority of the *Klasing* case) that no one who works on a month-to-month basis is excluded from the Act, regardless of salary.

Following the *Sayles* case, the court announces the rule as follows:

> "All that is necessary to decide here is that, if a person has been employed by the same company for a period of several years

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5. 335 Mo. 721, 73 S. W. (2d) 1011 (1934).

6. This view seems more in line with the other provisions of the section, for instance, the phrase "where average annual earnings." Furthermore, it is unsound to make a distinction between two employees who earn identical salaries, each in excess of $3600.00 per year, merely because one has a definite contract for more than a year, while the other has not. Surely the legislature had no such intention.

7. 344 Mo. 743, 128 S. W. (2d) 1040 (1939).

8. The opinion of the Springfield Court of Appeals (231 Mo. App. 334, 102 S. W. (2d) 769 (1937)) distinguished this case from the Klasing case on the ground that in this case Mills was employed under a written contract for a year or more at a fixed salary, and was continuously in the company's employ, while in the Klasing case there was no fixed salary and no fixed earnings prior to the actual doing of the work.

An interesting situation with reference to the procedure arose in this case. When the court of appeals handed down its opinion it was in conflict with the Klasing case. When the supreme court decided this case on *certiorari*, it pointed out that for that reason the opinion of the court of appeals should be quashed. But it pointed out further that if the opinion were quashed the court of appeals would have to re-write its opinion and follow the supreme court's opinion in this case and the Sayles case, and reach the same result as it had reached originally. Since the law does not contemplate a useless act, the court sustained the opinion of the court of appeals.

9. 130 S. W. (2d) 477 (Mo. 1939).

and has earned (and been paid) more than $3600 in each and every year, he is not under the act regardless of the basis of his salary contract (whether weekly, monthly, or annually, or subject to termination at any time) because his 'average annual earnings exceed three thousand six hundred dollars.' "[10]

II. JURISDICTION

The question of the jurisdiction of the supreme court to review was raised in *Sayles v. Kansas City Structural Steel Co.*[11] The claim for compensation was for a death benefit, and if any award had been made, it would have exceeded $7500.00.

The court, in assuming jurisdiction, re-affirms its decision in *Shroyer v. Missouri Livestock Commission Co.*[12] That case makes a distinction between an award of a death benefit and an award to a disabled employee.

In *Morse v. Potosi Tie & Lumber Co.*,[13] appellant claimed an estoppel against both employer and insurer because Morse had been classified as an employee in employer's insurance policy. In holding claimant not an employee, the court said that the jurisdiction of the Commission is determined from the acts of the legislature, and not by the conduct of the parties.

An interesting situation is presented in *Gieseking v. Litchfield & Madison Ry.*[14] In that case employee had received an injury in Illinois while engaged in interstate commerce. Employer reported the accident to the Illinois Industrial Commission, made payments of compensation to employee for temporary total disability, and took a final receipt, "in full settlement of compensation under the provisions of the Illinois Compensation Act . . ." Employee then brought suit under the Federal Act, and the railroad set up the final receipt as an accord and satisfaction.

The Illinois Act, as the Missouri Act, excludes employees engaged in interstate commerce. Our supreme court, following the established rule, holds that awards of compensation commissions to employees injured while

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10. *Ibid.* at 478. Note the language of the court so long as employee earns $3600 or more "*in each and every year.*" Does the language "average annual earnings" contemplate that the employee earn $3600.00 or more *each* year? If he earned $3000 one year and $4500 the next, his average earnings would be $3600.00 or more.

11. 344 Mo. 756, 128 S. W. (2d) 1046 (1939).

12. 332 Mo. 1219, 61 S. W. (2d) 713 (1933). The Shroyer case was followed in Platies v. Theodorow Bakery Co., 334 Mo. 508, 66 S. W. (2d) 147 (1933); Edwards v. Al Fresco Adv. Co., 340 Mo. 342, 100 S. W. (2d) 513, 514 (1937).

13. 130 S. W. (2d) 477 (Mo. 1939). In this case it was held that claimant was not an employee within the provisions of the Act.

14. 339 Mo. 1, 94 S. W. (2d) 375 (1936).

engaged in interstate commerce are void, and that the final receipt does not bar an action under the Federal Act.[15]

Of course, in the *Gieseking* case there was no award of the Commission. The record does not disclose that it ever passed on or approved the final receipt. Hence there was no action of the Commission to declare void. All that was necessary to the decision was the holding that the final receipt was no bar to an action under the Federal Act. However, in *State ex rel. Wors v. Hostetter*,[16] a somewhat analogous situation was presented, and the court went off in the other direction. In the *Wors* case, employee was working for one of a number of sub-contractors on a job in St. Louis owned by Midwest Company. He was an employee of the Illinois Terminal Railroad, which was engaged by Midwest to load dirt excavated in St. Louis into its cars and move the same into Illinois. While loading dirt, Wors was injured by reason of the negligence of an employee of Tarleton, the excavating contractor on the job. Wors filed claim for compensation, and at the same time sued Tarleton and Midwest for damages. He settled the compensation claim under Section 3333, Missouri Revised Statutes, 1929, and the Commission approved the settlement. Thereafter the defendants attempted to raise the plea of *res adjudicata.* In reply Wors contended the Compensation Commission had no jurisdiction to make the award in view of Section 3310[17] since his injuries were received while he was engaged in interstate commerce. The court of appeals found against Wors as to Midwest Company. He brought the case before the supreme court on *certiorari,* as conflicting with its decision in *Gieseking v. Litchfield & Madison Ry.*[18]

In passing on the point, the court begins by referring to the rule, well established as to courts of record, that a lower court will be deemed to have decided a jurisdictional or other question consistently with the judgment rendered, even though there was no express finding thereon, if a decision of such question was necessarily involved in arriving at the conclusion announced. It then ends by saying that inasmuch as this rule has never been applied to the holdings of a quasi judicial administrative body,

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15. The court further held that employee was not entitled to keep the payments received by him as compensation.

16. 343 Mo. 945, 124 S. W. (2d) 1072 (1939).

17. Mo. REV. STAT. (1929). "Sec. 3310. Applicability of chapter—general unless abrogated by federal statute—injuries received within and without the state—(a). This chapter shall apply to all cases within its provisions except those exclusively covered by any federal law."

18. 339 Mo. 1, 5, 94 S. W. (2d) 375, 376 (1936).

the opinion of the court of appeals cannot be in conflict with any of the prior decisions of the supreme court.[19]

On rehearing, Wors contended the award of the Commission was not a jurisdictional determination, as it was based on a compromise under Section 3333.[20] The court answers this by saying that a settlement, when approved, is more conclusive than an award on disputed evidence, because it is not subject to review, while an ordinary award is subject to review on proof of change in condition.[21]

III. PLEADINGS

State ex rel. St. Louis Car Co. v. Hostetter,[22] was a suit at common law. Plaintiff was an employee of Electro-Motive Co., which was operating in the plant of the St. Louis Car Company, installing electric motors in cars produced in the plant. He was injured by an employee of the Car Company. Defense was a general denial. Judgment was rendered for plaintiff, and the case came before the supreme court on *certiorari.* Defendant's position was that the plaintiff's evidence showed the case came within the terms of the Compensation Act, so that the circuit court had no jurisdiction.

The supreme court approved the opinion of the court of appeals which held that in an action on common law negligence, the compensation law is a matter of defense to be set up in the answer. Absent such a plea the defendant will not be permitted to affirmatively show such exception.[23] The

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19. It might be said that the court could have held that the case of State *ex rel.* Brewen-Clark Syrup Co. v. Missouri Workmen's Compensation Commission, 320 Mo. 893, 898, 900, 8 S. W. (2d) 897, 899, 900 (1928), could be construed to impliedly, if not actually, extend the rule to awards of the Commission. For that case did hold that an award of the Commission while acting within the scope of its authority "determines the rights of the parties as effectively as judgment secured by regular legal procedure, and is as binding as a judgment, until it is regularly set aside or its validity questioned in a proper manner." But even if an award is as binding as a judgment, still that would not settle the question, as a void judgment is always open to attack.

20. Wors relied on State *ex rel.* Saunders v. Missouri Workmen's Compensation Commission, 333 Mo. 691, 697, 63 S. W. (2d) 67 (1933).

21. Surely these two decisions are not in harmony. If the jurisdiction of the commission does not extend to injuries received in interstate commerce and its acts in such situation are void, they are subject to collateral attack. The Gieseking case so holds, although there had been no determination by the Commission, either express or implied, that it had jurisdiction. State *ex rel.* Wors v. Hostetter, 343 Mo. 945, 954, 124 S. W. (2d) 1072, 1075 (1939), distinguishes the Gieseking case on that point.

22. 131 S. W. (2d) 558 (Mo. 1939).

23. This cites as authority for the ruling Span v. Jackson-Walker Coal & Mining Co., 322 Mo. 158, 16 S. W. (2d) 190 (1929). How can this be reconciled with the following ruling in Gieseking v. Litchfield & Madison Ry., 339 Mo. 1, 7, 94 S. W. (2d) 375, 377: "But where the employee is not entitled to bring a common-law action, because such a common-law action has been superseded by Workmen's Compensation Law of this state, then such employee must prove him-

opinion of the court of appeals goes on to say that the rule is that if the facts do not appear on the face of the petition and the defense is not set up in the answer, still if plaintiff's own evidence shows as a matter of law that defendant's liability is under the compensation law and the defendant's obligations to plaintiff under the law have been discharged, then the trial court should give a peremptory instruction.[24]

IV. MISCELLANEOUS

A number of cases were decided on rules of evidence, and did not involve any new interpretation of any provision of the Compensation Act.

Wills v. Berberich's Delivery Co.,[25] had been before the court previously, and had been reversed because of the exclusion of certain evidence. The decision in the instant case discussed the rule against piling of inference on inference, and the rule applicable where one of two causes may have been responsible for an injury, for one of which the employer is responsible, but not for the other. This same rule was applied in *Meintz v. Arthur Morgan Trucking Co.*[26]

Reiling v. Russell,[27] involved a suit at common law by an employee against a third party who was responsible for his injury. He had been paid compensation by insurer up to January 1. In February the case at common law was tried. The defendant took the position at the trial that although plaintiff was contending his injuries were permanent and progressive, his compensation payments had ceased prior to the trial, and evidence of this fact should be admissible as an admission that his disability ceased on the date payments were stopped. In reply to this contention the court held that the cessation of payments was an act of the insurer and not of the plaintiff, and hence could not be an admission of plaintiff.

It was further held in the *Reiling* case that the defendant in such circumstances had no right to ask that the amount of compensation paid to

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self to have been injured while engaged in interstate work, in order to be within the scope of the Federal Employers' Liability Act, or he has no right, other than the right his State Compensation Act gives him. . . ." It would be just as easy for a defendant in an action under the Federal Employers' Liability Act to raise the issue by answer as it is for a defendant in a common law action for negligence. The rule should be uniform. In all cases the plaintiff should have the burden of taking himself outside the provisions of the compensation law, or in all cases the burden should be on the defendant to set up the compensation law as a defense.

24. What should the court do if all of these facts appear except that defendant had discharged his liability under the compensation law?

25. 339 Mo. 856, 134 S. W. (2d) 125 (1936).

26. 132 S. W. (2d) 1010 (Mo. 1939).

27. 134 S. W. (2d) 33 (Mo. 1939).

the plaintiff be deducted from any recovery he might have in the action at law; that the employer and insurer have the right to be reimbursed out of such judgment to the extent of the compensation paid.[28]

Liberty Mutual Insurance Co. v. Jones,[29] establishes the right of lay insurance adjusters to appear before the Commission at informal conferences—but denies them the right to take part in formal proceedings.[30]

In *McCoy v. Simpson*,[31] the court remanded the case to the circuit court because that court had mercly approved the award of the commission, and had failed to render any final judgment.

28. MO. REV. STAT. (1929) § 3309 does not so provide. It provides that the employer shall be subrogated to the rights of the employee as against a third party, and any recovery had by employer against such third party in excess of the compensation paid shall be paid to employee. It does not so provide in case the employee sues the third person. Undoubtedly that was the intention of the legislature. But if practical experience is any criterion, it would not be easy for the employer to recover compensation paid out from the employee's recovery against a third party. The matter could be simplified by making the employer or insurer interested in the common law action to the extent of compensation paid.

29. 344 Mo. 932, 130 S. W. (2d) 945 (1939).

30. MO. REV. STAT. (1929) § 3349 provides that "All proceedings before the commission or any commissioner shall be simple, informal and summary. . . ." The court quotes that section, but draws the line at preliminary conferences when the parties are trying to adjust their differences voluntarily. If they fail at that stage, an adversary proceeding is instituted. Although it does not so hold, that seems to be the point at which the layman must stop. ". . . it is not an act of advocacy within the statute (11692) for appellant's lay employees to appear at informal conferences. . . ."

31. 344 Mo. 215, 125 S. W. (2d) 833 (1939).